NAVAL WAR COLLEGE

International Law Situations

WITH SOLUTIONS AND NOTES

1934

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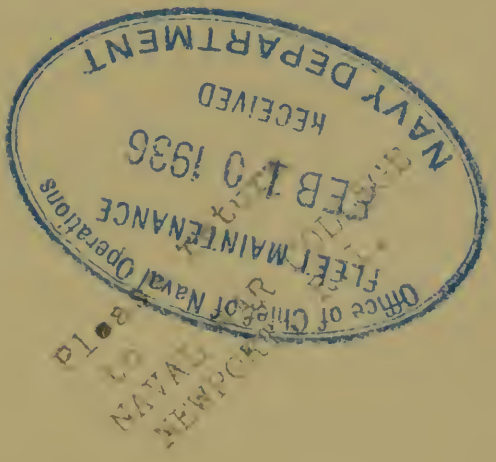

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PREFACE

This volume of International Law Situations for 1934 has, as in recent years, been prepared by George Grafton Wilson, LL. D., professor of international law at Harvard University. It covers topics upon which opinion has been changing, particularly since 1910 and which have been the subject of discussion by the War College Class of 1935. The method followed has been to propound situations for consideration by the officers, members of the class, and after critical discussion to organize the material for publication. The conclusions reached are in no way authoritative but the notes afford a convenient survey of materials relating to the subjects presented in the situations.

In order to increase the usefulness of this publication, criticisms and suggestions covering timely topics for discussion will be welcomed by the War College.

E. C. KALBFUS,
Rear Admiral United States Navy,
President Naval War College.

JUNE 25, 1935.

NOTE

With the completion of this year's course in international law the thirty-fifth year of continuous association of Prof. George Grafton Wilson, Ph.D., LL.D., with the Naval War College came to a close. At the final lecture of the year, on March 25, 1935, the President took occasion to recognize the valuable services of Professor Wilson, past and present, and to express to him the appreciation and esteem of the President and officers of the Naval War College and of the naval service at large.

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[1] Attention is called to the Appendices in which are the joint resolution of August 31, 1935, regulating export, transport, etc., in time of war; the President's statement in approving the resolution; and the President's proclamations of September 25, and October 5, 1935. These appeared after this volume was in press.

Situation I

TRANSFER AND CAPTURE

States X and Y are at war. Other states are neutral. This war was declared as from March 16.

State X has a large merchant marine. The Blue Line of steamers runs between state X and state D. This line was owned by a citizen of state X till March 1, fifteen days before the declaration of war, when it was sold to a citizen of state D. The citizen of state D on March 18 sells the line to Mr. E, a citizen of state E.

(*a*) Vessels of war of state Y on March 20 seize ships of the Blue Line as enemy property.

(*b*) Vessels of war of state Y also seize, on March 21, on the high sea a cargo of flour on the *Dale* of the Blue Line, which had originally been consigned by a merchant of state X to a merchant of state D to be paid for on delivery. The flour was shipped on March 15 and on March 19, advance payment having been made, title to the flour was transferred by telegraph to the merchant of D.

(*c*) State E announces that if reparation is not immediately made for both the above acts, it will regard these as violations of neutral rights and convoy its merchant vessels, giving all convoying commanders orders to prevent visit and search by vessels of state X.

(*d*) State F, considering that neutral rights will not be respected, arms its merchant vessels and instructs them to permit no submarines to approach except on the surface, and in case of doubt to endeavor to sink submarines.

How far are all these acts lawful?

SOLUTION

(*a*) The seizure of the ships of the Blue Line on March 20 as enemy property is not lawful.

(*b*) The seizure of the cargo of flour as enemy property on the *Dale* on March 21 is lawful. The transfer by telegraph on March 19 was not a valid transfer as against state Y.

(*c*) State E has a lawful right to convoy its merchant vessels. The right to convoy applies to innocent vessels only and does not imply a total denial of the right to visit and search.

(*d*) The arming of neutral merchant vessels is not unlawful though since the London Naval Treaty of 1930, article 22, presumed unnecessary and undesirable. Since the treaty of 1930 the order in regard to sinking submarines would be unlawful for states parties to article 22.

NOTES

General.—Either state X or Y, or perhaps both states, conforming to international agreements and following recent practice has declared war on March 16. Other states are neutral. The laws of war and the laws of neutrality accordingly are operative from that date. Both X and Y are maritime states and X has a large sea-borne commerce. It is natural that the citizens of state X should take measures for the protection of their property so far as possible. It is also natural that state Y should endeavor to meet these measures as far as possible. A merchant vessel legally flying a neutral flag is not liable to the same treatment as a belligerent merchant vessel. Owners of vessels under a belligerent flag might transfer such vessels to a neutral flag with the object of escaping belligerent liabilities. Owners of such vessels might in the exercise of ordinary business judgment make a sale of vessels. The purchaser might be a neutral in need of vessels and the transaction in-

volving the change of flag might be of such a nature as would take place in time of peace, but a transaction which might be entirely valid as between the citizens of two states in time of peace might be questioned in time of war.

Pre-war period.—There has been an effort, particularly during the twentieth century, to limit the effects of the war to the period of hostilities and to make this period of war definite. This was evident in Hague Convention III relative to the opening of hostilities which in article 12 provided that the existence of a state of war should be notified to neutrals and should "not take effect in regard to them till the receipt of a notification." One of the objects of the Hague conventions was to protect international commerce against the surprises of war and to limit the effects of war to the period of hostilities. Manifestly it is not reasonable that merchants should be liable for consequences of the possible outbreak of hostilities at some period in the indefinite future. Belligerents should, nevertheless, not be deprived of a reasonable right to capture ships which, though under a neutral flag, have not been *bona fide* transferred to the neutral. In time of peace a merchant or other person may dispose of his property for any reason which seems good to him and the property is then liable to such treatment as property of like character of nationals of the state of the new owner. If the property has not in fact passed from the original owner, then it should be liable to the same treatment as property of like character of other nationals of the state of the owner.

The validity of transfer before the war of property from Mr. N, a national of state N having strained relations with state M, to Mr. D, a national of state D having no concern in these strained relations, would under ordinary circumstances be presumed.

Bill of sale by Mr. D. to Mr. E., that is, from one neutral citizen to another neutral citizen, may not be on board, but would give rise to suspicion only, and the bill

of sale of a citizen of X to a citizen of D would not be expected to be on board.

Transfers, Crimean War, 1854–56.—During the war between Great Britain and Russia several vessels were brought before the British courts on suspicion of unlawful transfer from Russian to a neutral flag. Several of these vessels, though condemned by the lower court, were restored by the higher court on the ground "that the sale was *bona fide;* that the property was entirely divested from the vendor, and vested in the vendee before the seizure; that the transfer was complete, and was not a fraud upon any just right of the belligerents." In the middle of the nineteenth century it was generally considered that any transfer made in time of peace which would be a valid transfer from vendor to vendee would be valid in case war should subsequently break out and the ship should be captured, if the transfer had not been made while the ships were *in transitu.* The reasons for rejecting transfers *in transitu* in the courts of the middle of the nineteenth century as stated in the case of the *Baltica*, 1858, were two:

"The one is, that while the ship is on the seas, the title of the vendee cannot be completed by actual delivery of the vessel or goods; the other is, that the ship and goods having incurred the risk of capture by putting to sea, shall not be permitted to defeat the inchoate right of capture by the belligerent powers, until the voyage is at an end.

"The former, however, appears to be the true ground on which the rule rests. Such transactions during war, or in contemplation of war, are so likely to be merely colourable, to be set up for the purpose of misleading, or defrauding captors, the difficulty of detecting such frauds, if mere paper transfers are held sufficient, is so great, that the courts have laid down as a general rule, that such transfers, without actual delivery, shall be insufficient; that in order to defeat the captors, the possession, as well as the property, must be changed before the seizure." (11 Moore P. C. 141)

For many years it had been held that ships transferred *in transitu* in time of war would not thereby be exempted from the liability of capture. Nor could vessels be law-

fully transferred from a belligerent to a neutral flag in a blockaded port.

Attitude of maritime states, 1908.—In preparation for the International Naval Conference, London, 1908–09, 10 maritime states were asked to submit their accepted rules upon the topics before the conference. One of the topics upon which such replies were submitted was that of transfer of flag. The replies generally considered transfers before the outbreak of war as valid unless there was evidence of bad faith which might be argued if the transfer was merely to escape the consequences of the war. The problem before the conference as stated in the general report was:

> "An enemy merchant vessel is liable to capture, whereas a neutral merchant vessel is spared. It may therefore be understood that a belligerent cruiser encountering a merchant vessel which lays claim to neutral nationality has to inquire whether such nationality has been acquired legitimately or for the purpose of shielding the vessel from the risks to which she would have been exposed if she had retained her former nationality. This question naturally arises when the transfer is of a date comparatively recent at the moment at which the visit and search takes place, whether the transfer may actually be before, or after, the opening of hostilities. The question will be answered differently according as it is looked at more from the point of view of commercial or more from the point of view of belligerent interests." (1909 Naval War College, International Law Topics, p. 121.)

Articles of the Declaration of London.—After much discussion the International Naval Conference formulated articles in which transfer of flag of merchant vessels in accord with legal requirements of the respective states prior to the opening of hostilities would be presumed to be valid, though making additional proof necessary if the bill of sale was not on board and the transfer was made less than 60 days before the opening of hostilities. For transfers after the opening of hostilities the presumption was that the transfer was invalid, though in certain cases proof to the contrary might be entertained.

In general the aim was to avoid uncertainties by introducing specific regulations which might be understood by those engaged in maritime commerce and would not be left to court interpretation or verbal uncertainties save in exceptional cases. Such uncertainties were regarded as inevitable when the basis of legality was considered as resting on the proof of good faith of the parties to the transaction.

Time element in transfer.—At the time of the drafting of the Declaration of London, the period of 30 days, if transfer papers were on board, was regarded as establishing the validity of the transfer of a merchant vessel. Fifteen days with present rapidity of communications may be equally adequate.

Changing aspects of transfer.—The question as to transfer of merchant vessels from a belligerent to a neutral flag was often raised during the World War. New problems and new complications would, of course, arise with changing means and methods of transportation and communication. In the early period the ownership and operation of a vessel by the owner or the partners of the owner sharing in the navigation and in the results of the venture made a transfer comparatively easy to follow. Later, corporate ownership of vessels and the distribution of stock in these corporations through many countries introduced factors which had to be considered. Further, the distribution and incidence of insurance might make the loss or transfer of a vessel a matter of concern to other states than those of the vendor and vendee. In other words, the transfer of the flag of a vessel of a belligerent might be a much less simple transaction than formerly, and the belligerents during the World War endeavored to meet some of the problems by new expedients and novel statements as to legal rights.

Rules of transfer in World War.—Several states in entering the World War issued regulations in regard to transfer of vessels which were essentially in accord with the rules of the Declaration of London. The German

ordinance of September 30, 1909, conformed in the main features to articles 55 and 56 of the Declaration of London, as did the Japanese regulations of 1914. The instructions for the Navy of the United States, June, 1917, provided:

"57. The transfer of a vessel from one flag to another is valid when completed previous to the outbreak of war in which the State of the vendor is a belligerent, provided the transfer is made in accordance with the laws of the State of the vendor and the State of the vendee." (1925 Naval War College, International Law Documents, p. 114)

"58. The transfer of a private vessel of a belligerent to a neutral flag during war is valid if in accordance with the laws of the State of the vendor and of the vendee, provided that it is made in good faith and is accompanied by a payment sufficient in amount to leave no doubt of good faith; that it is absolute and unconditional, with a complete divestiture of title by the vendor, and with no right of repurchase by him; and that the ship does not remain in her old employment." (Ibid, p. 116)

On December 26, 1914, under Argentine general orders, it was stated without restriction to any period whether before or after war, that:

"The transfer of colors shall be consented to under reserve of its being done upon a basis of absolute good faith, and in the knowledge that the Argentine Government will decline all intervention in behalf of those interested if it should afterwards result that they have not fulfilled this condition." (Ibid., 1917, p. 30.)

Others made special rules somewhat dependent upon geographical proximity to the belligerents.

Transfer of the Dacia.—The *Dacia*, a German merchant vessel which in late 1914 was unable to make regular voyages under the German flag owing to the control of the sea by the Allied fleets, was transferred to American registry. Americans contemplated the purchase of other German vessels similarly circumstanced, and considered in some cases employing these exclusively between British and American ports.

The original plan of the American shippers was to dispatch the *Dacia* with a cargo of cotton from Galveston,

Texas, to Bremen, Germany, but on advice of the Department of State it was decided to send the *Dacia* to Rotterdam. It was agreed that the *Dacia* should not stop at any port hostile to the British, and that it might be detained for examination of the cargo at a British port. The Secretary of State in a letter of January 13, 1915, to the British Ambassador said:

". . . . I now ask if it is not possible, in view of the particular circumstances of this case, for the British Government to consent not to raise the question of the transfer of the vessel for this particular voyage, it being understood that neither Government yields any principle involved and that such action is not to serve as a precedent hereafter. The Department is convinced that shipment of cotton in this case is in good faith and that shippers took space on the *Dacia* in the belief that the vessel having been transferred to the American flag, they could safely ship in the *Dacia*." (Foreign Relations, U. S., 1915, Supplement, p. 678.)

British attitude, early 1915.—While the British attitude had not been unchanging, in a Memorandum of the British Embassy of January 2, 1915, it was stated:

"The British Embassy has received information as to the reported purchase of the German ship *Dacia*, of the Hamburg-American Line, now lying at Port Arthur, Texas, as a result of the outbreak of war, by certain American citizens who have applied for the transfer of the ship to the American flag.

"Further information is to the effect that the purchase price is one third the nominal value, the principal purchaser is not by occupation an owner of ships, that he is interested in the metal trade and that the avowed object of the purchase is to dispatch the ship to a German port under the American flag.

"The circumstances are no doubt under the consideration of the competent department of the United States Government.

"In connection with this matter it becomes the duty of the British Embassy to point out that while it has been the British and American rule, under certain conditions, to accept as valid the transfer of vessels from a belligerent to a neutral flag after the declaration of war, it has also been the rule that such transactions justify the strictest enquiry on the part of the belligerent. This enquiry has been in the past based upon the nature of the purchase, the character and occupation of the purchaser, the composition of the crew, and above all the business on which the ship is engaged before and after the transfer.

"These considerations will no doubt be familiar to the State Department but in order to prevent any possible misunderstanding the British Embassy takes this opportunity to point out that His Majesty's Government must reserve its rights as to the recognition of the validity of the transfer of the flag under these and similar circumstances.

CECIL SPRING RICE."

(Ibid., p. 674.)

Soon the exigencies of the World War and particularly the case of the *Dacia* gave rise to questions in new forms. The British Ambassador in Washington in a note to the American Secretary of State on January 12, 1915, gave a somewhat full statement:

"Dear Mr. Secretary: You ask me what is the attitude of my Government with regard to the transfer of the flag after the outbreak of hostilities. I beg to state in reply that I have not received any detailed instructions from my Government on this question although in general they propose to follow the principles laid down in the Declaration of London.

"As however they have not ratified the declaration it may be argued that in considering the question they must be guided by the principle which (in common with your Government) they have professed in times past. These principles are, as you are aware, that the absolute prohibition of sales of ships during hostilities would be too severe a measure for a commercial nation, although such sales must always be regarded with suspicion. It has, I believe, been generally held that the validity of the sale is judged by its commercial character; the purchaser must prove a *bona-fide* sale and in general the ship must not be used to serve enemy purposes under a neutral flag.

"So far, I understand, 111 vessels, formerly foreign, have received American registry since the war began and of these 86 were British and 17 German.

"My Government has hitherto let such transfers pass without protest in cases where the vessel was *bona fide* owned by an American company before the war, so that the transfer does not involve a sale, and where the vessel does not carry an enemy crew and is not employed in carrying supplies to an enemy or to a neutral port which is used for supplying an enemy. Cases where the vessel was originally owned by a non-American owner are regarded with suspicion because of the possibility that the transfer of the flag is resorted to for unneutral purposes. In the case of the *Sacramento* in San Francisco, a transferred ship was

collusively seized by a German cruiser and emptied of her stores of coal for belligerent use. The *Dacia* has been sold by a German company to a German-American for one third her value and is reported to be destined to a German port. The *Stoya Romana* was a Roumanian ship which received American registry in the port of Bremen; has cleared from that port, nominally for America, but has not so far as I know yet arrived here. If loss or damage results to Great Britain as a consequence of the transfer of these ships it is to be presumed that a claim will be made against the United States Government.

"But cases must arise in which the transfer of the flag is of a purely commercial character and the purchase effected without any but commercial objects. It has not I believe been the rule to contest the validity of the transfer if the *bona fides* of the sale is proved and if the ship when she changes her owner is employed with a neutral crew in neutral trade and between neutral ports.

"The German Government has declared that it would withdraw its objections to the transfer of a ship from an enemy to the American flag in cases where the ship traded exclusively between America and Germany. I think it not improbable, though I do not write under instructions, that my Government would raise no further question if a transferred ship were to trade between any ports not serving as ports of supply to the enemy.

"There is however the further question of the liberation of interned ships as a consequence of transfer. That is the question as to whether a neutral performs an unneutral act if in the course of the war he releases a belligerent from the consequences of military operations. This question is of course both difficult and complicated and no doubt, should the occasion arise, would become the subject for discussion.

"I am (etc.) CECIL SPRING RICE."

(Ibid., p. 676.)

This note introduces a proposition indicating that there is a responsibility resting upon a neutral state to intern belligerent merchant vessels, and if these depart there may be a claim against the neutral state. Such a novel proposition would certainly open questions which would be "both difficult and complicated" and would also be without any sound basis of reason in international law.

The case of the *Dacia* became in some respects a test case, and was stated in a communication from the Secre-

tary of State to the American Ambassador in Great Britain on January 14, 1915, as follows:

"German steamship *Dacia* recently transferred to American register due to sail from Galveston with full cargo cotton Friday or soon thereafter as possible. Owners have contemplated voyage to Bremen. Upon Department's suggestion owners of ship and cargo consent to send ship to Rotterdam direct with entire cargo of cotton which is sold for delivery in Germany by day certain. Shippers took space on *Dacia* after American registry in good faith, believing they could safely ship. Officers and crew entirely native American citizens. Vessel will go direct to Rotterdam, not touching at any enemy port, and return this country, agreeing to detention for examination of cargo. No other bottoms available for cotton and shippers threatened with disastrous loss if unable to use *Dacia*. Ship bought for half price due to natural causes from German ships lying idle. Please call on Grey at once and lay this situation before him in person and seek to have British Government consent not to raise question of transfer for this particular voyage on conditions above stated, neither Government waiving any principle involved and case not to serve as precedent hereafter. If arrangement consummated, Department will issue statement that arrangement is agreed to by Great Britain to facilitate this shipment of cotton and case not to serve as precedent and all prospective transferees of enemy vessels will be so advised. Freight rates on cotton are now practically prohibitive. Under recent restrictions of British Government, English ships practically denied transfer of register. Parties who purchased *Dacia* state they endeavored purchase British and French ships without success. Report earliest possible moment.

BRYAN."

(Ibid., p. 678.)

While the British authorities replied that they would be willing to purchase the cargo of the *Dacia*, if brought to a British port, at the price it would realize at the German destination, the ship itself if coming under British authority would be brought before a prize court.

The British mentioned the sale of such ships as the *Dacia* as in effect "the liberation of interned ships during the course of hostilities."

The argument as presented by the British Secretary of State for Foreign Affairs is repeated by the American Ambassador in a communication of January 18, 1915:

". . . My inquiry whether British Government would object to purchase and transfer of German interned ships to ply between American and British ports brought from Sir Edward Grey the most ominous conversation I have ever had with him.

"He explained that the chief weapon that England has against any enemy is her navy and that the navy may damage an enemy in two ways: By fighting and by economic pressure. Under the conditions of this war economic pressure is at least as important as naval fighting. One of the chief methods of using economic pressure is to force the German merchant ships off the seas. If, therefore, these be bought and transferred to a neutral flag this pressure is removed.

"He reminded me that he was not making official representations to the United States Government and for that reason he was the more emphatic. If the United States without intent to do Great Britain an injury, but moved only to relieve the scarcity of tonnage, should buy these ships it would still annul one of the victories that England has won by her navy. He reminded me of the fast-rising tide of criticism of the United States about the transfer of the *Dacia* and he declared that this has intensified and spread the feeling against us in England on account of our note of protest. He spoke earnestly, sadly, ominously, but in the friendliest spirit . . . They (the English) regard the *Dacia* as a German ship put out of commission by their navy. She comes on the seas again by our permission which so far nullifies their victory. If she comes here she will, of course, be seized and put into the prize court. Her seizure will strike the English imagination in effect as the second conquest of her—first from the Germans and now from the Americans. Popular feeling will, I fear, run as high as it ran over the *Trent* affair; and a very large part of English opinion will regard us as enemies.

"If another German ship should follow the *Dacia* here I do not think that any government could withstand the popular demand for her confiscation; and if we permit the transfer of a number of these ships there will be such a wave of displeasure as will make a return of the recent good feeling between the two peoples impossible for a generation. There is no possible escape from such an act being regarded by the public opinion of this Kingdom as a distinctly unfriendly and practically hostile act." (Ibid., p. 682.)

On January 23, 1915, the President directed a reply to some of the notes recently received from the American Ambassador in Great Britain. This note pointed out some of the causes of irritation which British action

might cooperate in removing. Referring particularly to the *Dacia*, he said:

"The *Dacia* case has received a great deal of newspaper notoriety because of predictions as to what would be done with her. Breitung, seeing that there was a chance to profit by the high freight rates, decided to buy a ship. He first tried to buy an English ship and then a French ship but, as his correspondence shows, he failed to secure a ship from either country. He then bought the *Dacia*, paying for it about three fourths of what it cost fourteen years ago when it was built. He secured a cargo of cotton and intended to sail for Bremen. When he was informed that it would be wiser to go to Rotterdam he changed the route and planned to sail to Rotterdam. The inquiries which have come to the State Department have come from the owners of the cotton, rather than from the owner of the ship. The Government has had nothing to do with the transaction further than to make inquiries for interested parties. Whether the ship is taken into the prize court or not is a question between the British Government and the owner of the ship, but, if it is taken into the prize court the court will of course decide upon the evidence produced and so far as we know the evidence will support the *bona fides* of the transactions. If the evidence shows that the sale was made in good faith, the transfer cannot be objected to according to the rules recognized by both Great Britain and the United States. A change in these rules at this time could not be made by the United States and it would seem to be an inopportune time for Great Britain to change them. Great Britain fears that the *Dacia* might be made a precedent and that other German interned ships would be bought in case the *Dacia* sale was not contested. That is true and yet the precedent would only stand in case the sales were *bona fide* in which case they would come within the rules. The chief point presented in your despatch is that Great Britain is trying to bring pressure to bear upon Germany by preventing the sale of interned German ships. This is perfectly legitimate so long as the pressure is exerted according to the international law, but the pressure becomes illegitimate if well-settled rules are violated, and a well-settled rule would be violated if an attempt was made to prevent a *bona fide* sale.

"The point which should be made very clear to the British authorities as our view and purpose in the whole matter, if such purchases are made, is that as a matter of actual fact such purchases do not constitute a restoration of German commerce to the seas. Such ships would not and could not be used on the former routes or with the former and usual cargoes and would serve as German commerce in no particular. They would serve only the

trade of the United States with neutral countries and within the limits necessarily set by war and all its conditions. The withdrawal of so many ships from the seas is so far a curtailment of the commerce of the United States. The United States cannot in the circumstances sell articles to Germany which the rules of war or the circumstances now existing forbid. The owners of the ships bought from German owners cannot use them on the routes or to the ports which would serve their former owners as the carriers of German commerce. They would be used on new routes and for the release of American merchandise to new ports. They would represent an extension of American commerce, not a renewal of German. This cannot be justly or even plausibly regarded as an effort to relieve the present economic pressure on Germany or to recreate anything that Great Britain had a right to destroy. America must have ships and must have them for these uses. She will build them if she cannot find them for sale. The legitimate restoration of American commerce may be delayed but it cannot be prevented. It cannot be part of the purpose of the British Government to put an intolerable economic pressure on the United States, as might very easily be the result if its attitude as reflected in your note is maintained." (Ibid., p. 685.)

The American Ambassador in Great Britain seemed to see more than the legal and political aspects of the case and said, "I cannot exaggerate the ominousness of the situation. The case is not technical but has large human and patriotic and historic elements in it." (Ibid., p. 683.) The American Ambassador in his communication to the Secretary of State seemed even more concerned than the British Embassy had been on January 2, 1915, when in stating the British view upon transfer the legal attitude had been under consideration. In the early British communication in regard to the *Dacia*, there had been no suggestion that neutrals assumed responsibility for internment of merchant vessels or that they might not remain indefinitely and be the subject of mercantile transactions, and, liable to usual laws of prize, depart under any flag.

French attitude, early 1915.—Questions had arisen in regard to transfer of vessels which, because of practical certainty that they would be captured if they went to sea, were still in neutral ports. The French Government had

indicated, in 1908–09, that it was in substantial accord with the view of the United States as expressed at the London Naval Conference, but that vessels tied up in neutral ports because of risk in going to sea were not in the categories under consideration. Of these vessels the French Ambassador in a letter to the American Secretary of State, January 16, 1915, said:

"My Government wishes your excellency's kind attention, which is known to be devoted to international justice, to be called anew to this problem. It trusts that you will readily admit that the contingency of flag transfers about which we cannot but be concerned and in which we could not acquiesce without breaking our own laws publicly announced even in time of peace, would, if it came to pass, be tantamount to supplying our enemies with financial means for carrying on the war and for escaping the consequences of the command of the sea gained by the Allied fleets, not without battles and losses. It appears no exaggeration to say that, in case a contingency so harmful to my Government's interests should, contrary to its firm hopes, become a reality, the purchase of German merchant ships in their present tied-up condition would amount to an act of assistance to our enemies. We take the proclamations of the President of the United States, as stated in my previous communication, to be a safe guaranty that he could not wish any such harm done to our country by his.

"Be pleased (etc.) JUSSERAND"

(Foreign Relations, U. S., 1915, Supplement, p. 681.)

On February 16, 1915, the Ambassador of France in Washington addressed a communication to the Secretary of State of the United States in regard to transfer of American-owned vessels sailing under a foreign flag and to be transferred to the American flag.

"MR. SECRETARY OF STATE: Referring to the communications which I have previously had occasion to make to your excellency on the subject of vessels sailing under a foreign flag but owned by Americans, which may be transferred to the American flag by virtue of the act of August 18, last, I have the honor to inform you that my Government wishes to make it clear that our recognition of such a transfer is to be understood in the sense hereinbelow stated, which, as your excellency will acknowledge, is in conformity with logic and practiced rules;

"1. The recognition of a transfer effected under the above-stated conditions presupposes, of course, that the transaction is

bona fide and that the vessel is not to be under the direction or in the service of enemy interests either before or after the transfer.

"2. Reliable reports which have reached the Government of the Republic show that the German Government has refused to recognize such transfers except when the vessels concerned were to serve German interests. The principle of equality which governs the relations between neutrals and belligerents prevents the Allied Governments from respecting, in such case, any trade that might be carried on with Germany under the American flag as long as that power does not, for its part, respect trade carried on with the Allied countries under absolutely similar conditions.

"3. Recognition of the transfer to the American flag of an enemy vessel under the special circumstances accepted by the Allied Governments may not and must not, by reason of the foregoing, be taken for granted and effective except when the vessel availing itself of it does not actually serve enemy interests by sailing or trading for the account of an enemy country.

"4. It is important to note that subjects of an enemy country who may be kept in the crew of the vessels transferred to the American flag would be liable to arrest as being subject to military service, in accordance with the decision jointly reached by the French and English Governments which was made public through insertion in the *Journal officiel de la République française* of the 3d of November last." "JUSSERAND." (Ibid., p. 690.)

The Russian Ambassador had, a few days previously, informed the Secretary of State that the Russian Government adhered to the French position.

Decision in case of the Dacia.—The *Dacia* was captured by the French auxiliary cruiser *Europe* on February 27, 1915. The *Dacia* was brought before the Consul des Prises and the decision was rendered August 3–5, 1915. The decision referred to the provisions of the Declaration of London and many other documents, but finally pronounced the *Dacia* good prize:

"Décide:

"Est déclarée bonne et valable la capture du vapeur *Dacia*, ensemble ses agrès, apparaux, armement et approvisionnements de toute nature, effectuée le 27 fevrier 1915 par le croiseur auxiliaire de la République *Europe*, pour le prix en être attribué aux ayants droit conformément aux lois et règlements en vigueur;

"Seront restitués aux ayants droits les objets et effets, propriété personnelle du capitaine et de l'équipage, et ne constituant pas des articles de contrebande."
(1922 Naval War College, International Law Decisions, p. 37; [1916] Décisions du Conseil des Prises, p. 180.)

Corporate ownership.—The liability of a merchant vessel to capture may in the case of ownership by a corporation depend upon the nationality of the actual owners and their relation to the employment of the vessel. Such was the condition in the case of the *Hamborn*, belonging to a company incorporated before the World War under the laws of the Netherlands though the control was wholly in German nationals and questions of Dutch law and international law were involved. This vessel was captured and brought before the British prize court where it was condemned, December 12, 1917 ([1918] p. 19.) The case on appeal came before the Judicial Committee of the Privy Council which sustained the prize court decision and said:

"If the case turned on her user *de facto* at the time of capture it would be simple: so it would be, if her owners were natural persons of neutral nationality *de jure*, neither adhering to the enemy nor allowing their chattel to be used in enemy service. The present case is more complex. The criteria for deciding enemy character in the case of an artificial person differ from those applicable to a natural person, since in the nature of things conduct, which is one of the most important matters, can in the former case only be the conduct of those who act for or in the name of the artificial person. It was decided in the case of *The Daimler Company, Limited* v. *The Continental Tyre and Rubber Company* (*Great Britain*), *Limited*, that, in the case of an incorporated company, the right and power of control may form a true criterion, the control, that is, of those persons, who are the active directors of the company and whose orders its officers must obey, or the control of those persons, who in their turn are the masters of the directorate and make or unmake it by the use of the controlling majority of votes. The application of this test presents no difficulty here, for no living person and no sentient mind exercised or possessed any control over the *Hamborn* Steamship Company except persons and minds of enemy nationality. The residence of the two German managers in Rotterdam if not

altogether immaterial, at any rate cannot affect the result, since the question is not one of trading with enemy subjects, resident or carrying on business in a neutral country, but is one of the character of an artificial *persona*, whose trade is carried on for it under the supreme direction and control of enemies born. Their Lordships agree with a passage of the President's judgment, which sufficiently represents the true gist of his reasoning:

"'The centre and whole effective control of the business of the *Hamborn* Steamship Company was in Germany. Having regard to these facts, the vessel must be regarded in this Court as belonging to German subjects,'

in a claim by captors for condemnation." ([1919] A. C. 993.)

Abrogation of Article 57, Declaration of London.—Article 57 of the Declaration of London read:

"Subject to the provisions respecting the transfer of flag, the neutral or enemy character of a vessel is determined by the flag which she has the right to fly.

"The case in which a neutral vessel is engaged in a trade which is reserved in time of peace, remains outside the scope of, and is in no wise affected by, this rule." (1909 Naval War College, International Law Topics, p. 131.)

This article aimed to safeguard the rights of belligerents and of neutrals and recognized the difference between ownership of ships and ownership of cargoes. The understanding was set forth in the general report, presented to the conference on behalf of the drafting committee, which said:

"The principle, therefore, is that *the neutral or enemy character of a vessel is determined by the flag which she has the right to fly.* It is a simple rule which appears satisfactorily to meet the special case of ships, as compared with other movable property, and especially with merchandise. From more than one point of view, ships have a kind of individuality; especially they have a nationality, a national *character*. This nationality is manifest in the right to fly the flag; it places the ships under the protection and control of the State to which they belong; it makes them amenable to the sovereignty and to the laws of that State, and, should the occasion arise, to requisition. This is the surest test of whether a vessel is really a part of the merchant marine of a country, and therefore the best test for determining whether she is neutral or enemy. It is, moreover, expedient to

rely exclusively upon this test, and to discard whatever is connected with the personal status of the owner.

"The text mentions: the flag which the vessel has the *right to fly;* that means, naturally, the flag which, whether she is actually flying it or not, the vessel has the right to display according to the laws which govern the port of the flag." (*Ibid.*, p. 131.)

This article 57 had been operative during the early part of the World War and had in general seemed satisfactory, but after discussions upon the *Dacia* and other transfers, the British and French Governments gave notice of the abrogation of article 57 and the British Order in Council of October 20, 1915, also stated that, "In lieu of said article, British prize courts shall apply the rules and principles formerly observed in such courts."

The French explanation of its attitude in annulling the rule that the "neutral or enemy character of a vessel is determined by the flag which she has the right to fly" is stated somewhat definitely in a report to the President of the Republic.

"PARIS, *October 23, 1915.*

"SIR: Among the rules of international maritime law, formulated by the declaration signed at London February 26, 1909, which was not ratified, but which is being actually applied by the decree of November 6, 1914, during the present war with certain reservations, consisting in some additions and modifications, the ruling inscribed under Article 57 of this declaration establishes an absolute presumption of the neutral or enemy character of vessels according to the flag the vessel has a right to carry.

"Experience has proved that such a strict rule is in practice capable of leading to inexact solutions. It may happen that for commercial purposes, during a time of peace, vessels were regularly registered under a flag which has become an enemy one by reason of the war, while in reality the interests vested in the ownership of these vessels belong to nationals of a third country which may be neutral or Allied. Conversely vessels registered under a neutral flag may as a matter of fact represent enemy interests.

"The reunion of capital in the form of societies renders these combinations particularly easy to realize thanks to the real personality, legally capable of holding property, and to the nationality

which the law recognizes and accords to societies independently of the personality or the nationality of the individuals who own interests in it.

"One of the objects which a belligerent may legitimately pursue on the high seas according to international law is to annihilate by capture the mercantile marine of the enemy. If by attacking neutral interests represented by a vessel registered under the enemy's flag the belligerent deviates from the aforementioned aim and finds himself accused of violating the liberty of neutral commerce, his right to act legitimately is directly injured by the employment of registration under a neutral flag covering enemy interests with a protection which nothing justifies.

"If these views, which have also struck our Allies, appear to you to be well founded, I have the honor to submit for your approbation the following draft of a decree.

RENE VIVIANI,
The President of the Council and
Minister for Foreign Affairs.
VICTOR AUGAGNEUR
The Minister of Marine.

(Foreign Relations, U. S., 1915, Supplement, p. 180.)

The purpose of the annulment of article 57 by the Allied Powers was to enable the prize courts to look beyond the right to fly the flag to the actual ownership of the vessel which might be a corporation, the stock of which was for the most part enemy- rather than neutral-owned. That the owner should bear the legitimate risk of loss in case of capture seemed a logical conclusion, and ownership which might in time of peace be advantageous to all, might in time of war, if carried by a neutral flag, escape such liability. British subjects who owned vessels or shares in vessels under neutral flags had realized the liabilities. Even though this might be the situation in regard to belligerent ownership and even though article 57 of the Declaration of London might not be operative, this did not imply that belligerent merchant vessels remaining in neutral ports for whatever reason were *ipso facto* "interned", in the technical meaning of that term, as some of the communications had implied.

Internment.—For maritime relations the doctrine of internment was comparatively recent, applied particu-

larly during and since the Russo-Japanese War, 1904–05. Internment implied a detention of a vessel of war in a neutral port pending some agreement as to its disposition. The neutral authorities assumed reasonable responsibility for the maintenance of this detention. The belligerent vessel of war might be detained at a naval station, the crew might be similarly detained, and the officers were usually placed on parole. Sometimes essential parts of the machinery and of the guns were removed from the vessel. Vessels of war of a belligerent were ordinarily permitted to remain in a neutral port only 24 hours without becoming liable to internment.

No such restrictions rested upon belligerent merchant vessels in neutral ports. These vessels could, so far as the neutral was concerned, go and come at pleasure subject to the usual commercial restrictions. If a merchant vessel of a belligerent preferred to remain in port rather than to depart, there was no law or custom to the contrary. There was no 24-hour rule of sojourn.

Transfer of goods in transitu.—From early days of maritime trade transfer in time of peace of goods *in transitu* was a common and well recognized practice. It was sometimes maintained:

> "that a mere delivering of the bill of lading is a transfer of the property;" * * * "When war intervenes, another rule is set up by Courts of Admiralty, which interferes with the ordinary practice. In a state of war, existing or imminent, it is held that the property shall be deemed to continue as it was at the time of shipment till the actual delivery; this arises out of the state of war, which gives a belligerent a right to stop the goods of his enemy. If such a rule did not exist, all goods shipped in the enemy's country, would be protected by transfers which it would be impossible to detect. It is on that principle held, I believe, as a general rule, that property cannot be converted *in transitu;* and in that sense I recognize it as the rule of this Court. But this arises, as I have said, out of a state of war, which creates new rights in other parties, and cannot be applied to transactions originating, like this, in a time of peace. The transfer, therefore, must be considered as not invalid in point of law, at the

time of the contract; and being made before the war, it must be judged according to the ordinary rules of commerce." (The *Vrow Margaretha* (1799), 1 C. Robinson Reports, 336.)

This transfer *in transitu* having taken place before the war and without intention to avoid the consequences of the war was valid. The burden of proof of liability to capture in cases of transfers *in transitu* rests upon the captor.

If a transfer *in transitu* was made because of the imminence of the war, the sale was regarded as invalid by the captor of the goods. Sir William Scott in 1804 in the case of the *Jan Frederick* said:

"The motive may indeed be difficult to be proved—but that will be the difficulty of particular cases: Supposing the fact to be established, that it is a sale under an admitted necessity, arising from a certain expectation of war; that it is a sale of goods not in the possession of the seller, and in a state where they could not, during war, be legally transferred, on account of the fraud on Belligerent rights;—I cannot but think that the same fraud is committed against the Belligerent, not indeed as an actual Belligerent, but as one who was, in the clear expectation of both the contracting parties, likely to become a Belligerent, before the arrival of the property, which is made the subject of their agreement. The nature of both contracts is identically the same, being equally to protect the property from capture of war—not indeed in either case from capture at the present moment when the contract is made, but from the danger of capture, when it was likely to occur. The object is the same in both instances, to afford a guarantee against the same crisis: In other words, both are done for the purpose of eluding a Belligerent right, either present or expected. Both contracts are framed with the same *animo fraudandi*, and are, in my opinion, justly subject to the same rule." (The *Jan Frederick* (1804), 5 C. Robinson Reports, 128.)

In this case Sir William Scott also says "the same rule of law is to be applied to such contracts *in transitu*, made in anticipation of war, as are applied to similar contracts in time of actual hostilities." It has been maintained that the element which invalidates the transfer is the "attempt to defeat the rights of belligerent captors." (The *Southfield* [1915], 1 B. & C. P. C., p. 332.) Refer-

ring in this case to "contemplation of war" and to war as "imminent", Sir Samuel Evans said in its proper meaning imminent is "threatening or about to occur."

In the extended opinion in the case of the *Kronprinzessin Margareta*, the *Parana*, etc., among other pronouncements, it was laid down in 1920 that:

"The rule against recognizing transfers of enemy goods while at sea, if unaccompanied by actual delivery and transfer of possession, is so well established and is now so ancient that its authority cannot be questioned or its utility impugned for the purposes of a judicial determination. Its application assumes that the circumstances of the shipment, and the dealings with the shipping documents and otherwise, are not such as to make the shipment itself an actual delivery of the goods to the transferee through his agent the carrier. It assumes also that a documentary transfer has taken place in good faith by a real and not a sham transaction, and that in pursuance of that transfer rights have been acquired by the transferee, which in other Courts not bound by such a rule would be valid and enforceable. With sham transactions Courts of Prize would deal in another fashion; with incomplete transactions insufficient to transfer rights, no Court would deal at all. The expression 'mere paper transaction', sometimes used, does not imply that something unreal or ineffectual in itself is under discussion. It serves to draw attention to the fact that the transaction is unaccompanied by any dealing with the goods themselves, such as by its overt or notorious character would serve to inform the captor as to the subject which he seizes and the nature of the right, if any, which he may be entitled to acquire in consequence." (1 A. C. [1921] 486.)

Convoy.—The Naval War College carried on a discussion upon the subject of convoy in 1911 soon after the publication of the unratified Declaration of London. This discussion was with view to calling attention to some of the existing special treaty provisions in regard to protection of neutral vessels. The right of convoy has been a subject of controversy for nearly 300 years and the applicability of convoy as a right remains undetermined. In the War College discussion of 1911, it was shown that there seemed to be a tendency to accept convoy as a right. Great Britain had generally opposed

though occasionally by treaty had agreed to the practice, and in the British Admiralty Manual of Prize Law of 1888 had asserted in regard to visit and search,

"No vessel is exempt from the exercise of these powers on the ground that she is under the convoy of a neutral public ship."

In the memorandum setting forth the British views in preparation for the London Naval Conference of 1908–09, it was said:

"7. A neutral vessel is not entitled to resist the exercise of the right of search by a belligerent war-ship on the ground that she is under the convoy of a war-ship of her own nationality; forcible resistance by her or by the neutral war-ship to the exercise of the right of search is ground for condemnation of both ship and cargo." (Correspondence and Documents respecting the International Naval Conference. Misc. No. 4 (1909), Cd. 4554, p. 4.)

In support of this position, citations were given to the case of the *Maria*, 1799 (1 C. Robinson Reports, 340), and the *Etsabe* (4 C. Robinson Reports, 408).

Sir Edward Grey in his letter to Lord Desart, the British Plenipotentiary, however, said:

"18. The question of the right to visit, search, and seize neutral ships when under convoy is one on which there has been a clear divergence between the old continental system and the British doctrine. That doctrine has however not been enforced in any recent war. In 1854 the right to visit ships under convoy was specifically waived, owing to the difficulty inherent in naval co-operation with an allied Power which did not recognize that right. Nor have His Majesty's Government since attempted to exercise it. The situation was radically changed by the Declaration of Paris, which put an end to the right formerly enjoyed, of seizing enemy goods other than contraband, under whatever flag carried, and His Majesty's Government are now desirous of limiting as much as possible the right to seize for contraband, if not eliminating it altogether. In proportion as the lists of contraband are reduced—and there is good ground for hoping that this will be successfully done in a large measure—the value of the right to seize for contraband automatically diminishes. Whilst accordingly, on the one hand, the importance to a belligerent of the right to seize vessels under convoy has lost most of its value, the principle of exemption is, on the other hand, favourable to neutral trade, and in conformity with the spirit of British policy. This is therefore one of

the cases where, owing to the force of changing circumstances, the original British contention has practically lost its importance, so that its specific abandonment would effect no substantial alteration in the actual situation, and may very well be admitted to be little more than the formal acknowledgment of a now generally accepted rule." (Parliamentary Papers, Misc. No. 4, International Naval Conference. (1909), Cd. 4554, p. 25.)

Declaration of London on convoy.—While there were differences of view among the 10 naval powers participating in the International Naval Conference of 1908–09, the conciliatory attitude of Great Britain made agreement upon the question easier than had been expected and agreement occasioned much satisfaction to the Conference. This was particularly true because many states had treaties according respect to convoys. The treaties between Continental European states and American states generally recognized the right of convoy.

Article 61 of the Declaration of London was as follows:

"Neutral vessels under convoy of their national flag are exempt from search. The commander of a convoy gives, in writing, at the request of the commander of a belligerent ship of war, all information as to the character of the vessels and their cargoes, which could be obtained by visit and search." (1909 Naval War College, International Law Topics, p. 139.)

of this article the general report says:

"If neutral Governments allow belligerents to visit and search vessels sailing under their flag, it is because they do not wish to assume the responsibility for the supervision of such vessels, and therefore allow belligerents to protect themselves. The situation changes when a neutral Government consents to assume that responsibility; the right of visit and search has no longer the same ground.

"But it follows from the explanation of the rule given respecting convoy that the neutral Government undertakes to give the belligerents every guarantee that the vessels convoyed shall not take advantage of the protection which is accorded to them in order to do anything contrary to neutrality, for example, to carry contraband of war, to render unneutral service to the belligerent, to attempt to violate blockade." * * *

"A written declaration is required, because it prevents all ambiguities and misunderstandings, and because it binds more fully the responsibility of the commander. This declaration has for its aim to make visit and search unnecessary by the mere fact that this would afford to the cruiser the information which the visit and search itself would have supplied." (Ibid., p. 139.)

In order that the commander of the visiting vessel may be even more secure in his opinion as to the innocence of the vessels under convoy, article 62 provided:

"If the commander of the belligerent ship of war has reason to suspect that the confidence of the commander of the convoy has been abused, he communicates his suspicions to him. In such a case it is for the commander of the convoy alone to conduct an investigation. He must state the result of such investigation in a report, of which a copy is furnished to the officer of the ship of war. If, in the opinion of the commander of the convoy, the facts thus stated justify the capture of one or more vessels, the protection of the convoy must be withdrawn from such vessels." (Ibid., p. 141.)

If the commander of the visiting cruiser is not then satisfied, he may protest and there would be resort to diplomatic settlement. If the convoying commander withdraws his protection the merchant vessel cannot complain because "She has deceived her own Government, and has tried to deceive the belligerent."

Of this Article the report of the British Delegates to Sir Edward Grey said:

"In pursuance of the directions contained in section 18 of our general instructions, we intimated to the Conference that Great Britain was willing to recognize the immunity from visit and search of neutral vessels under convoy, as one of the now generally accepted principles of international law. This attitude on our part naturally smoothed the way for the adoption of the rules comprised in chapter VII of the Declaration. Some controversy arose as to the procedure to be prescribed in cases where it was found that the officer commanding the convoy had been deceived, and that contraband was in fact carried on board a vessel or vessels under his convoy. The solution adopted, as embodied in article 62, vindicates in every respect the freedom from belligerent interference of the convoying officer. It is he who alone is to investigate any allegations made against a particular vessel or vessels forming

part of his convoy, and only if he is satisfied of their truth is he called upon to withdraw his protection from the offending vessels. These provisions seem to us to be the logical deductions to be drawn from the principle of immunity if once admitted, and we therefore agreed to them. It may be well to point out that any failure on the part of the commander of the convoy to carry out the obligations imposed upon him under Article 62 could not be redressed by resort to the International Court, which would have no jurisdiction in such a matter. The injured belligerent would have to seek his remedy by way of diplomatic representation." (Parliamentary Papers, Misc. No. 4, International Naval Conference (1909), Cd. 4554, p. 100.)

As the British Government seemed to have in 1909 taken the position in regard to convoy that generally prevailed, the question was considered practically settled and rules in regard to naval warfare were drawn accordingly.

Attitude of the United States in 1914.—In reply to a question raised in early August 1914 as to whether the United States would "look with favor on furnishing escorts for fleets of grain-carrying steamers destined for France", the Secretary of State said:

"DEPARTMENT OF STATE,
WASHINGTON, *August 8, 1914.*

Referring to telegram from Wichita Mill and Elevator Company, wheat and provisions are classed as conditional contraband of war under generally accepted principles of international law, and therefore subject to capture and confiscation by belligerent vessel if destined for a belligerent government, its army or navy, or its port blockaded or held by military forces; if not so destined they are not contraband of war. Holland is not now at war and wheat and foodstuffs destined for use in that country not considered contraband of war. Persons are free to sell or ship foodstuffs from United States in ordinary commercial transactions without violating United States neutrality laws. Pending passage of bill before Congress, foreign boats referred to may not be registered in United States. This Government could not well furnish escort for fleet of grain steamers as such escort might involve United States in serious complications.

W. J. BRYAN."

(Foreign Relations, U. S., 1914, Supplement, p. 274.)

Of course any action may involve complication as may inaction, but in August 1914, there was a general belief in Europe that the United States would maintain the neutral rights of its citizens, but would not interfere with the belligerents. Many suggestions were made both by belligerents and neutrals in regard to convoying, but in general convoying of neutral merchant vessels was not common.

Swedish proclamation, 1915.—The King of Sweden by proclamation of October 29, 1915, stated that the purpose of convoying was to "afford" Swedish merchant ships protection against search and detention by warships of foreign powers.

"4. Merchant ships which carry contraband of war, or which may reasonably be suspected of intending to render assistance contrary to the laws of neutrality to a neutral power, may not under any circumstances be included in the convoy.

"5. In order to prevent merchant ships referred to in Section 4 being included in the convoy, such measures of control as are considered suitable may be taken with regard to ships for which convoying has been applied for." (Foreign Relations, U. S. 1915, Sup. p. 628; 1918 Naval War College, International Law Documents, p. 154.)

Armed neutral merchant vessels.—While neutral merchant vessels were as a general rule armed against "pirates and thieving robbers" in early days, such arming was not common after the middle of the nineteenth century. The Declaration of Paris of 1856 in stating "Privateering is and remains abolished" was thought to put an end to the need of armed merchant vessels. There had been many bilateral treaties before this date forbidding privateering, as the treaty between the United Provinces and Sweden, 1675; between the United States and Prussia, 1785; and some of these early treaties made the penalty for privateering the same as for piracy.

The words "piracy" and "privateering" were often used without clear distinction and sometimes the conduct of pirates and of privateers were very similar, and each word had varying meanings.

Piracy has had many definitions in the municipal laws of states. In general piracy from the international point of view is an unauthorized act of violence or depredation for private ends or showing, as was formerly said, *animus furandi* and committed outside any national jurisdiction.

A privateer is usually commissioned by a letter of marque and reprisal or by some other authorization permitting a vessel to prey upon the property of a foreign state or of the citizens of that state.

There may be reason for questioning the grounds for arming private vessels of belligerents in time of war and this question has been much discussed. The arming of neutral merchant vessels would be on grounds distinct from those supporting the arming of belligerent merchant vessels, and during recent wars piracy and privateering would not be among these grounds.

Defense has been a usual ground for the use of force. Convoy has been resorted to as a method of defense against unlawful interference with neutral rights. In convoy there is a responsible state agency acting in defense of the neutral rights with a presumption that these rights are clearly understood by the commander of the convoy and that he is acting under instructions from his state.

The arming of neutral merchant vessels would put a responsibility upon the master of the vessel for which he presumably had not been trained and in the exercise of which much would be left to chance.

The treatment of armed neutral merchant vessels during the World War gave rise to discussion but there was no uniform opinion upon the subject.

Attitude of belligerent toward armed neutral merchant vessels.—There was uncertainty on the part of Great Britain even in regard to the armed British merchant vessels, and in a message of Ambassador Page to the Secretary of State on January 5, 1917, this uncertainty is somewhat fully presented.

"The British Government does not appear to know exactly where they stand with our Government with regard to the arming of British merchantmen. In spite of our general pronouncement to the effect that merchantmen may properly be armed for defensive purposes they do not know how this would work out in practice or whether our authorities have laid down specific rules as to what constitutes defensive armament or what such rules might be. They understand in a general way that there is to be a limitation in number and in calibre of guns and that they should be mounted at the stern, failing which that ships might be classed as warships.

"The British authorities look for a recrudescence of submarine activity off the American coast as soon as the Allies' reply to the President's note is made public, and they feel it their duty to see to it that their ships are adequately armed to meet this menace since from time immemorial it has been the undisputed right of merchantmen to arm for defense. In old times it was not thought unusual for a merchant man to be armed not merely with bow and stern chasers but with broadsides as well, and the necessity for this sort of armament is greater to-day than ever before, for, whereas in old times a hostile cruiser would be sighted on the horizon and the merchantman would take to flight using her stern chasers for defense, today a hostile submarine might suddenly appear on the surface a mile ahead of the merchant ship and if the latter mounted guns only at the stern she would be in no position to defend herself. So much for the number and position of guns.

"With regard to the calibre, the Admiralty has knowledge that the new German submarines carry comparatively heavy guns with a range of something like 8.000 yards. A merchantman with guns of less range might just as well be totally unarmed.

"A point which seems to me to be of some importance is that the British Admiralty holds that there is nothing in the question as to whether British merchantmen are armed for defense or offense. Whatever the armament might be a merchantman to-day could be armed only for defense. since there is nothing afloat against which she could take the offensive. She can not be armed for the purpose of seeking out and destroying less heavily armed enemy merchant ships since none such is at present on the high seas, and it is not reasonable to suppose that a merchant ship, being without armor—no matter how numerous or how heavy her guns might be—could possibly be so rash as to attack an enemy man-of-war, but a heavy and mobile armament obviously seems necessary for merchantmen to meet the present submarine menace, and, if there is any danger of British merchant ships being re-

fused clearance papers in American ports because of this, they may have to give up using American ports whenever possible." (Foreign Relations, U. S., 1917, Supplement I, p. 546.)

This position seems to indicate a policy on the part of the British Government which in some respects would be out of accord with the American Department of State memorandum of September 19, 1914 (1916 Naval War College, International Law Documents, p. 93), but the practice of the authorities of the United States had been liberal in construing the memorandum of September 19, 1914.

The Ambassador of the United States in Germany reported on January 21, 1917:

"At 7:30 yesterday evening Count Montgelas of the Foreign Office called on me and said that the following note had been sent to the embassies and legations of several neutral nations, particularly Spain and Norway, but was not sent to the United States because that country did not seem to be arming its merchant vessels, that Von Stumm, Undersecretary of State, had asked him, Montgelas, to give me a copy. Montgelas further said that Germany had never receded from the position it took concerning armed merchant vessels in the German note of February, 1916.

"The *note verbale* is as follows, and is in French. I send translation and will send original French tomorrow in open cable:

"'According to information worthy of belief which the Imperial Government has received from a neutral country, the British Government has endeavored quite recently to decide the neutral shipowners engaged in transportation on its order to arm their ships with cannons. Likewise the armament of these neutral ships has been called for in the most energetic manner by English public opinion.

"'In view of these proceedings the German Government thinks it ought to call the attention of the neutrals to the fact that under existing conditions, neutral armed merchant ships run the risk of being taken for armed enemy merchant ships and of being in consequence attacked, these latter ships maneuvering often under a neutral flag to lay trap for German submarines. Moreover neutral ships of commerce which may make use of their temporary armament will be treated as pirates by the German naval forces.

"'The Imperial Department for Foreign Affairs leaves it to the (space for name of legation) to communicate the preceding to its government by telegraph. Berlin, the (_____), to the Legation of (_____).'" (Ibid., p. 91.)

Action of the United States, 1917.—On March 12, 1917, while the United States was neutral, the Department of State gave to all foreign embassies and legations the following:

"The Department of State has the honor to state for the information of the _____ Embassy that in view of the announcement of the Imperial German Government of January 31, 1917, that all ships, those of neutrals included, met within certain zones of the high seas, would be sunk without any precautions being taken for the safety of the persons on board, and without the exercise of visit and search, the Government of the United States has determined to place upon all American merchant vessels sailing through the barred areas an armed guard for the protection of the vessels and the lives of the persons on board." (Foreign Relations, U. S., 1917, Supplement I, p. 171.)

Armed neutral merchant vessels in foreign neutral waters.—Immediately after the arming of neutral merchant vessels, questions arose as to the status of such vessels in foreign neutral waters. Some states had prohibited the entrance of armed vessels without limiting the prohibition to merchant vessels of belligerents.

In early March 1917 the Department of State of the United States sent to Spain, Norway, Sweden, and The Netherlands a query as to whether those governments prohibited "the entrance and departure of merchant vessels armed for defensive purposes." (Ibid., p. 550.)

The replies were as follows:

Spain, March 4, 1917,

"Minister of Foreign Affairs states there are no restrictions against entrance or departure from Spanish ports of merchant vessels armed for defense only and no intention to change such." (Ibid, p. 551.)

Norway, March 6, 1917,

"The Minister for Foreign Affairs informs me that the Norwegian Government does not object to merchant vessels armed

defensively entering and leaving Norwegian ports, but that such vessels are subject to examination by naval authorities." (Ibid, p. 551.)

Sweden, March 6, 1917,

"Foreign Office considers Government's attitude undetermined, case in point not yet having arisen. More explicit answer promised after careful consideration." (Ibid, p. 551)

The Netherlands, March 10, 1917,

"Minister of Foreign Affairs informs me Dutch Government has treated armed merchantmen as war vessels since declaration of neutrality at beginning of war and they are not permitted to enter territorial waters except under stress of weather, etc. No distinction is made for vessels armed for defensive purposes. This refers to belligerent vessels. Dutch Government has arrived at no conclusion regarding armed neutral vessels. Minister for Foreign Affairs will inform me of any action which may be taken in this regard." (Ibid, p. 552)

These replies do not cover the attitude toward armed neutral merchant vessels and further questions were raised particularly in regard to the treatment of neutral merchant vessels which had been armed privately and those which had been armed and furnished gun crews by a government.

Later the American Ambassador in Spain informed the Secretary of State in a telegram of March 18, 1917, that,

"Spanish Government now acting under regulation promulgated about two years ago which permits merchant vessels carrying one cannon for defensive purposes to enter Spanish ports as merchant vessels. No distinction is made between neutral and belligerent vessels nor between merchant vessels armed by private owners or by Government authorities. Merchant vessels armed with more than one cannon have frequently entered Spanish ports within last two years and if armament is obviously for defensive purposes only Minister of State informs me the number of cannon is ignored. Minister further states that no modification of this regulation is now contemplated but that at any moment circumstances may demand a change of policy, in which event the Embassy will be promptly informed." (Ibid, p. 554)

The Minister to Sweden, in a telegram to the Secretary of State March 21, 1917, said:

"Foreign Minister told me to-day he was authorized give verbal Swedish neutrality rules. Contained no mention of armed merchant vessels, and that for the present Swedish Government was unable make any definite decision, but reserved the right to treat each case separately later in conference. I drew from Foreign Minister the statement that for the present armed American merchant vessels, whether armed by the Government or by the owners, would be allowed freely to enter and depart from Swedish ports as heretofore. In reply to my inquiry the Minister for Foreign Affairs *confidentially* stated that Sweden did not care to set a precedent on this question at present, but preferred to await developments, and that in not definitely committing themselves at present, Sweden obviated what might lead to some embarrassment with neighboring countries. I learned to-day from high Swedish official that Danish representative will make similar reply." (Ibid, pp. 554–55.)

The reply of the Netherlands was embodied in a communication of March 22, 1917:

"By virtue of the Royal Decree of July 30, 1914, the presence of war vessels or vessels assimilated thereto belonging to foreign powers within the territorial waters of the Netherlands is not permitted.

"Armed merchant vessels fall within the category of vessels without any distinction being made between the case where the owner of the ship has furnished her with armament on his own authority and the case where the foreign government has placed a military force on board the vessel for her protection.

"The Royal Decree does not apply to the colonies of the Netherlands." (Ibid., p. 555.)

These replies do not show any clear unanimity of opinion as to what should be the rule of treatment of armed neutral merchant vessels.

(*a*) *Transfer of vessels before war.*—In case of a transfer before war the nationality of a ship was presumed to be that of the flag it had a right to fly. The right to fly the flag might be questioned, but, when proven that was till the World War and by most states during the World War regarded as conclusive as to the

nationality of the vessel. Good faith in the transfer would, of course, be essential. It would be difficult to assume that transfer 15 days before the outbreak of war in accord with the law of the vendor and in accord with the law of the vendee could be proven invalid, and a purchaser would be justified in resting his title on conformity to law without even raising the question of intent or good faith in such a case.

Of course an entirely different type of question arises in case of transfers after the outbreak of war.

(*b*) *Seizure of flour on the Dale.*—The *Dale*, a vessel of the Blue Line, had sailed before the outbreak of war and the title to the flour was in the merchant of state X and was to be paid for by the merchant of state D on delivery. The merchant of state D after the declaration of war, by a change in terms of the original transaction, does obtain title to the flour by telegraph. The flour is of enemy origin and enemy goods, and a transfer, which would have been valid in time of peace is not valid in time of war. The transfer is not valid and the flour is liable to capture and condemnation.

(*c*) *Convoy.*—Many of the rules issued by maritime states subsequent to 1909 and before 1915 embodied in some form, so far as convoy was concerned, Articles 61 and 62 of the Declaration of London. This was true of the French instructions of 1912; the Japanese regulations of 1914; the Italian decree of 1915; and the instructions of the United States of 1915 and 1917.

The use of convoy was therefore considered lawful and probable at the outbreak of the World War, though of course the right of convoy would not extend to the protection of vessels engaged in unlawful undertakings. The legality of the conduct of vessels under convoy is vouched for by the commander of the convoy, and if a commander of a vessel of war of either of the belligerents questions the conduct of a vessel under convoy the matter should be investigated in good faith.

(*d*) *Merchant vessels and submarines.*—Article 22 of the London Naval Treaty of 1930 is as follows:

"The following are accepted as established rules of International Law:

"(1) In their action with regard to merchant ships, submarines must conform to the rules of International Law to which surface vessels are subject.

"(2) In particular, except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety. For this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board.

"The High Contracting Parties invite all other Powers to express their assent to the above rules." (1930 Naval War College, International Law Situations, p. 159.)

The significance of this article in its relation to submarines and armed vessels was discussed quite fully at the Naval War College in 1930. The questions involved in Situation I, 1930, were, however, mainly in regard to relations of belligerent submarines and merchant vessels of belligerents, and the rights of belligerents in regard to one another are under consideration, but Article 22 of the London Naval Treaty of 1930 applies not only to belligerents but also to neutrals, and a neutral would have even less justification for disregarding its provisions and in a lawfully conducted war no justification.

SOLUTION

(*a*) The seizure of the ships of the Blue Line on March 20 as enemy property is not lawful.

(*b*) The seizure of the cargo of flour as enemy property on the *Dale* on March 21 is lawful. The transfer by telegraph on March 19 was not a valid transfer as against state Y.

(*c*) State E has a lawful right to convoy its merchant vessels. The right to convoy applies to innocent vessels only and does not imply a total denial of the right to visit and search.

(*d*) The arming of neutral merchant vessels is not unlawful though since the London Naval Treaty of 1930, article 22, presumed unnecessary and undesirable. Since the Treaty of 1930 the order in regard to sinking submarines would be unlawful for states parties to article 22.

SITUATION II

INTERFERENCE WITH SHIPS

States X and Y are at war in 1934. Other states are neutral. States X, Y, N, M, and O are parties to the Washington Treaty Limiting Naval Armament of 1922 and the London Naval Treaty of 1930.

A private ship-building company in state N, prior to the war, has built for state X several 20,000-ton unarmed vessels equipped with decks for aircraft landing and flying off, and these vessels have been serving on the high sea as stations for the regular transoceanic air service between state X and state M.

(*a*) One of these vessels, the *No. 5*, which had been nearly completed in 1929 but on which on account of an accident and labor troubles construction had been delayed, having on the day before war was declared sailed under the flag of N for state M in order to install there certain essential flying-off equipment, was met at sea the day after war was declared and before reaching state M, by the *Yoba*, a vessel of war of state Y. The captain of the *Yoba* wished to convert the *No. 5* immediately into an aircraft carrier to accompany the *Yoba* and accordingly seized the *No. 5* and made this conversion.

(*b*) If the *Yoba* had met the *No. 5* after installing its equipment in state M, and when sailing under the flag of state N for X, would the decision be the same as in (*a*)?

(*c*) A private shipbuilding company in state R has completed a vessel of 9,000 tons with 5-inch guns and a deck for two aircraft, the *No. 6*, for which state X has paid but which had not sailed from R before the decla-

ration of war. Y communicates to R a request that the *No. 6* be interned.

(*d*) The *Saba*, a merchant vessel, lawfully flying the flag of state S is summoned to lie to by a submarine of state X and is visited by a boat from the submarine. State S has a treaty with state X agreeing to the "delivering up" of contraband and the Master of the *Saba* offers to "deliver up" all contraband maintaining this is his sole obligation under the conditions. The submarine threatens to sink the *Saba* unless it agrees to change its course and proceed to port Xena of state X.

What are the lawful rights of all the parties under the above conditions?

SOLUTION

(*a*) The *No. 5* was on a lawful voyage when met by the *Yoba*.

The *Yoba* could seize the *No. 5* and bring her to a prize court of Y.

Except in the case of urgent military necessity conversion before adjudication would not be lawful and in any case full compensation must be made for N's loss.

(*b*) The *No. 5* after installing its equipment in state M and sailing for state X should be brought to a prize court.

Except in case of urgent military necessity conversion before adjudication would not be lawful.

States N and M have no responsibility nor would Y have any liability as the *No. 5* is bound for X, a belligerent destination.

(*c*) The *No. 6* should be interned by state R.

The construction of the *No. 6* in state R is lawful.

(*d*) The *Saba* is under legal obligation to "deliver up" the contraband. The *Saba* is under no legal obligation to agree to change its course and to proceed to port Xena, though it would be under obligation to go if accompanied by the submarine or in control of a prize crew.

NOTES

Treaties and international law.—Treaty is the general term used to cover agreements between two or more states. It is understood that to be valid it must be in accord with the law of both of the parties to the treaty and in accord with international law. Other political entities than states may enter into international agreements so far as they have capacity under their fundamental law, and the treaty-making capacity of some states is not unlimited. Two or more states may enter into a treaty for a specific purpose which has little or no relation to other states, and which may have no bearing on international law, *e. g.*, two states might agree between themselves as to the diversion of the waters of a shallow boundary stream. Two or more states might enter into a treaty which, while binding only the parties, might have a far-reaching effect upon other states, *e. g.*, two states might agree upon an offensive and defensive alliance. Two or more states might agree upon principles which should for a specified period or for specified conditions be considered as binding, *e. g.*, the principles of the Treaty of Washington of 1871 in regard to neutral liability. Such treaties may or may not be regarded as important for international law, but they tend to become significant as precedents and may, as in the case of the principles of the Treaty of Washington, become generally accepted as setting forth international law. When a principle once a subject for treaty negotiation becomes generally recognized, it may be regarded as international law, *e. g.*, inviolability of ambassadors.

The most common type of treaty is an international agreement in which the parties provide for mutually advantageous conduct or understandings with reference to one another. Such a treaty as the Washington Treaty of 1922, limiting naval armament, may have been satisfactory to the parties as putting an end for the time

to their competition in naval armament, and the London Naval Treaty may have elaborated these understandings. These treaties would not necessarily create any legal obligations for nonparty states, nor form bases for principles of international law, though the policies of third states might be modified by the obligations assumed by the party states.

The states party to a treaty have an international obligation to observe the provisions of a treaty into which they have entered, though there is often a difference of opinion as to the interpretation of the provisions. There could not be any legal objection raised when a state avails itself of the provisions of a treaty in accord with which it may modify its relations to the other parties to the treaty, or by actual denunciation in accord with the provisions of the treaty may put an end to all its obligations under the treaty. Treaties concluded in perpetuity, or without provision for revision or denunciation, have usually been causes of international disputes and misunderstandings.

Aircraft station vessel.—There may be a distinction between an aircraft station vessel and a seadrome, as the aircraft station vessel is itself capable of navigation and comes within the category of vessels, while the seadrome is a structure for a specific purpose. The status of the seadrome would therefore be subject to different laws from those governing vessels.

While an aircraft station vessel might not be primarily designed for an aircraft carrier, such a vessel might be transformable into an aircraft carrier. No intention to furnish an aircraft carrier to a belligerent could be based simply on the fact of pre-war construction of an aircraft station vessel of a type already in use for maritime aircraft stations on a line between two states.

Further there is no limitation upon the tonnage of such vessels in any treaty, as these vessels are not constructed for war purposes. It may be doubtful whether one belligerent, when both belligerents were parties to

Hague Convention VI of 1907 relating to status of enemy merchant ships at the outbreak of hostilities, would be justified in detaining in its own ports at the outbreak of war such a vessel under the provisions of article V, which reads:

"The present Convention does not affect merchant-ships whose build shows that they are intended for conversion into vessels of war."

If the build of an aircraft station vessel did not show that it was intended for conversion into a vessel of war, articles 2 and 3 of the convention provides that if such a vessel is detained in a belligerent port or met at sea and is requisitioned, there must be payment of compensation.

In the discussion at the Naval War College in 1932 artificial structures and maritime jurisdiction were considered and it was pointed out that a seadrome as located at a defined place at sea would be different in character from an aircraft vessel from the nature of its construction and possible use. The seadrome as a fixed structure would have rather more of the attributes usually associated with land jurisdiction while the aircraft vessel would in the main be under maritime rules even though, if permanently located at a specified place at sea, the jurisdiction might be somewhat modified from that exercised over a vessel navigating under ordinary circumstances.

Aircraft carrier.—In the Washington Treaty on the Limitation of Armament, 1922, Chapter II, Part 4, "Aircraft Carrier" was defined as follows:

"An aircraft carrier is defined as a vessel of war with a displacement in excess of 10,000 tons (10,160 metric tons) standard displacement designed for the specific and exclusive purpose of carrying aircraft. It must be so constructed that aircraft can be launched therefrom and landed thereon, and not designed and constructed for carrying a more powerful armament than that allowed to it under Article IX or Article X as the case may be." (1921 Naval War College, International Law Documents, p. 322.)

This definition was replaced in the London Naval Treaty, 1930, Article 3, by the following:

"'The expression "aircraft carrier" includes any surface vessel of war, whatever its displacement, designed for the specific and exclusive purpose of carrying aircraft and so constructed that aircraft can be launched therefrom and landed thereon.'" (1930 Naval War College, International Law Situations, p. 144.)

This definition of 1930 is specifically limited to "vessels of war" and in the same article there is provision that the fitting of a landing-on or flying-off platform or deck on a capital ship, cruiser, or destroyer not designed or adapted exclusively as an aircraft carrier, would not make these vessels chargeable against aircraft tonnage.

Regulations of United States, 1914.—Shortly after the declaration of war in 1914, the United States as a neutral issued instructions in regard to foreign vessels in ports of the United States. The following telegraphic instruction was sent in early August to the collector of customs of the port of New York:

"'Have representative of each foreign vessel in your port certify to this Department whether she is a merchant vessel intended solely for the carriage of passengers and freight, excluding munitions of war, or whether she is a part of the armed force of her nation. This information is for purpose of maintaining the neutrality of the United States under recent proclamation President. Clearance will be refused in absence of this certificate.

"'Wire Department before issuing clearance papers to foreign vessels unless you are satisfied after careful inspection that ship has not made any preparations while in port tending in any way to her conversion into a vessel of war. Taking on abnormal amount of coal, except in case of colliers, would indicate such conversion. Unpacking of guns already on board would be conclusive. Painting of vessel a war color would indicate conversion. It must be clear that she is not to be used for transportation recruits or reserves for a foreign army or navy. This does not prevent transportation of passengers in usual sense, as where there are women and children and men of different nationalities even though among them there were a few reserves without your knowledge. If her passengers are nearly all men and practically all of same nationality, clearance cannot be granted. It must be unquestionable that she has no arms or munitions of war aboard.'" (Foreign Relations, U. S., 1914 Supplement, p. 595.)

Such instructions had been preceded by a communication of the British chargé d'affaires of August 4, 1914, in which he said to the Secretary of State:

"SIR: His Majesty's Government have been informed that the German vessel *Kronprinz Wilhelm* sailed from New York on the night of the 3d of August, without passengers, but with a heavy load of coal, 7,000 tons, and fitted with two long-range guns. Her superstructure had also been painted gray. All these preparations were made before the vessel left United States waters.

"It is a matter of common knowledge that similar preparations are being made on board other German vessels, notably the *Vaterland* and the *Barbarossa*, in United States ports, and they will no doubt attempt to adopt the same tactics as the *Kronprinz Wilhelm*.

"In view of the state of war now existing between Great Britain and Germany I have the honour, under instructions from Sir Edward Grey, to call your most serious attention to the action taken in regard to these vessels and to urge the United States Government to take immediate steps to prevent these and other such vessels leaving United States waters without passengers and after carrying out such obviously warlike preparations as described above, which, when carried out in neutral waters, constitute a distinct breach of the laws of neutrality." (Ibid, p. 594.)

In reply for the Secretary of State, Mr. Lansing said:

"SIR: I have the honor to acknowledge your note No. 254 dated August 4, 1914, 11 p.m., but presented to the Department on the following day, on the subject of the equipment and sailing of the *Kronprinz Wilhelm* from New York on the night of the 3d instant, and of preparations being made on board the German vessels *Vaterland* and *Barbarossa* in United States ports.

"Under instructions from Sir Edward Grey you call my attention, in view of the state of war existing between Great Britain and Germany, 'to the action taken in regard to these vessels and to urge the United States Government to take immediate steps to prevent these and other such vessels leaving United States waters without passengers and after carrying out such obviously warlike preparations as described above, which, when carried out in neutral waters, constitute a distinct breach of the laws of neutrality.'

"In reply I have the honor to inform you that as the instance of the *Kronprinz Wilhelm* occurred, as you say, on the 3d instant before the declaration of war with Germany had been issued by the British Government, it would appear that the statement in

your last paragraph quoted above has no application to the case of that vessel.

"As to the attitude of the United States Government toward the other vessels mentioned in your note I have the honor to advise you that these vessels are, and have been for some time, under the surveillance of United States authorities with a view to preventing a breach by them of the neutrality of the United States. The Department is advised that these vessels have not as yet left American waters.

"With reference to your statement quoted above as to what in the opinion of His Britannic Majesty's Government may be considered as constituting a breach of the laws of neutrality in cases of this character, I have the honor to refer you to my note of the 19th instant relating in some respects to the rights and duties of the United States as a neutral power during the pending European wars." (Ibid. p. 602.)

Naval vessel in port.—While under the Washington Treaty of 1922 on Limitation of Naval Armament, Article XI, there was a restriction upon the construction by one of the contracting parties for another contracting party of vessels of war exceeding 10,000 tons displacement, this provision did not apply to non-contracting parties. By article 8 of the London Naval Treaty of 1930, the exemption on the ground of tonnage is somewhat further restricted and more definite provisions are enumerated as to equipment.

Though the parties to the specific provisions of the Washington and London treaties would be bound by the provisions of these treaties and though states not parties to these treaties would not be bound by the treaties as such, all parties would be bound by the principles of international law.

The rules in regard to internment of vessels of war are comparatively modern rules, and Hague Convention XIII, Article 24, provides for internment of a vessel of war with its officers and crew. The instructions of states in regard to internment usually provide for vessels of war which have entered neutral ports after the outbreak of war. The regulations in regard to submarines issued

during the World War mainly contemplated the entrance of armed and commissioned vessels.

A vessel which is in a neutral port, completed, armed, and paid for by one of the belligerents but not yet manned or commissioned may be a potential threat to the other belligerent. It might quickly become an instrument of war if conveyed outside of neutral jurisdiction and so long as it remains within neutral jurisdiction it is safe from capture. In order that this protection afforded by neutral jurisdiction may not be used by one belligerent to the advantage of one as against the other, it has been customary to require that neutrals show due diligence in supervising activities tending to aid either belligerent along certain well-defined lines in furnishing and equipping ships.

The *Somers*, 1898.—A torpedo boat, the *Somers*, belonging to the United States, had, during the war with Spain in 1898, been stored at Falmouth, England. In November 1898, after active hostilities had ceased and before the treaty of peace had been signed, the United States desired to bring the *Somers* from England and requested permission from the British Government stating that "in case of resumption of hostilities with Spain this vessel will not be made use of."

After considering the American proposition, the British Government through the Foreign Office said on December 8, 1898:

> "In view of this assurance I have the honor to state that Her Majesty's Government are glad to comply with your request, and that the necessary instructions will at once be sent to the proper authorities in order to facilitate the departure of the vessel." (Foreign Relations, U. S., 1898, p., 1007.)

American attitude on submarines, 1930.—At the London Naval Conference in 1930, the members of the American delegation endeavored by speeches over the radio and otherwise to make known, not merely to the Conference, but to the world at large, their attitude upon questions before the Conference. The chairman of the

American delegation on February 6 stated to the press that "Our delegation is in agreement on every item of our program", and at the end of the Conference this was reaffirmed.

At the plenary session of the Conference on February 11, he said:

"The essential objection to the submarine is that it is a weapon particularly susceptible to abuse, that it is susceptible of use against merchant ships in a way that violates alike the laws of war and the dictates of humanity. The use made of the submarine revolted the conscience of the world, and the threat of its unrestricted use against merchant ships was what finally determined the entry of my country into the conflict. In the light of our experience it seems clear that in any future war those who employ the submarine will be under strong temptation, perhaps irresistible temptation, to use it in the way that is most effective for immediate purposes, regardless of consequences. These considerations convince us that technical arguments should be set aside in order that the submarine may henceforth be abolished. We have come to the conclusion that our problem is, whether in this day and age, and after the experiences of the last war, the nations at this conference are justified in continuing to build these instruments of warfare, thereby assuming responsibility for the risk of repeating in any possible future wars the inhumane activities which have been condemned by the verdict of history.

"It seems to the American Delegation that we have a common interest in the abolition of the submarine; first of all, for the purpose of suppressing costly weapons which we can forego by agreement and by the abolition of which we reduce our requirements in other classes of ships; and, second, for the purpose of eliminating for the future the dreadful experiences of the past.

"The American Delegation, therefore, urges that we set aside purely technical considerations and give careful study to the possibility of eliminating this whole problem." (Publications of the Department of State, Conference Series No. 3, pp. 21–22.)

On the proposition of the French delegation on that day, the five powers agreed to place the use of submarines under the same rules as the use of surface vessels of war, though there has been question as to whether the article of the treaty drafted for the purpose accomplished that end.

In a radio address on February 16, 1930, Senator Robinson, a member of the American delegation, stated the French proposition as that:

"all of the nations should agree that hereafter submarines shall be forbidden to attack merchant ships, except after visitation and search, and provision made for the safety of passengers and crew in the same way that international law requires surface vessels to do." (Ibid, p. 26.)

Treaty agreement on rules for submarines, 1930.—The London Naval Conference agreed upon rules for the conduct of submarines as regards merchant vessels in part IV, article 22, which states:

"The following are accepted as established rules of International Law:

"(1) In their action with regard to merchant ships, submarines must conform to the rules of International Law to which surface vessels are subject.

"(2) In particular, except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety. For this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board."

"The High Contracting Parties invite all other Powers to express their assent to the above rules." (Publications of the Department of State, Conference Series, No. 2, p. 16)

In a pamphlet issued in 1930 by the Department of State containing a digest of the treaty it was said:

"Part IV. (This part applies to the United States, Great Britain, France, Italy, and Japan.)

"Article 22. This article specifies that submarines must conform to the rules of international law to which surface vessels are subject regarding merchant ships, and further provides that any warship (whether surface vessel or submarine) must not sink or render incapable of navigation, a merchant vessel without first having placed the passengers, crew, and ship's papers in a place of safety, except when such merchant vessel persistently re-

fuses to stop on being duly summoned or actively resists visit or search. It also provides that the merchant ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured under existing conditions by the proximity of land or the presence of another vessel which is in a position to take them on board.

"All the powers not party to the treaty are invited by this article to express their assent to the above rules." (Publications of the Department of State, Conference Series, No. 4, p. 9.)

This part of the treaty is to "remain in force without limit of time."

The earlier rules to which it may be presumed this article 22 refers are in regard to visit and search, though in wording this article is comprehensive and refers to all action of "surface vessels" "with regard to merchant ships." It is also presumed that article 22 in mentioning "surface vessels" intended to include all types though in preceding articles it has been customary to refer specifically to "surface vessels of war" or even "naval surface combatant vessels."

Question may be raised as to action on the part of a merchant vessel of an enemy or of a neutral which might constitute "persistent refusal" to stop on being "duly summoned" or "active resistance."

The instructions for the Navy of the United States of June 1917 state:

"47. If the summoned vessel resists or takes to flight she may be pursued and brought to by forcible measures if necessary."

The United States has regarded resistance or flight as ground for using force sufficient to cause the merchant vessel to lie to for visit and search, but not as ground for sinking the vessel. Of course the merchant vessel might be sunk in the exercise of the right, but the use of force was held to be restricted to that necessary to bring the vessel to, and forcible resistance by the merchant vessel was not in itself a ground for sinking the merchant vessel, but a just ground for its condemnation.

As by the explanations and remarks of those negotiating the treaty, the intent was to restrict the action of

submarines in order that they should conform to the accepted rules for surface vessels under international law, it would be unwise for any naval officer to be less strict in interpretation of the rules of international law in regard to the use of force in connection with visit and search than prior to 1930. In other words, the merchant vessel might be "brought to by forcible measures if necessary" and such measures should be strictly limited to that end, as more extreme action must depend upon other considerations, some of which may rest upon the results of the visit and search for which the merchant vessel is brought to.

Hitherto even in case of flight or "persistent refusal to stop" sinking of a merchant vessel would not be approved if the vessel could otherwise be stopped, and sinking in case of "active resistance" or of resistance would be only a last resort. It cannot be presumed that those are in error who would read the treaty as follows:

(1) In general, in their action with regard to merchant ships, submarines must conform to the rules of International Law to which surface vessels are subject, but

(2) In particular, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety, except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search.

Sending in of seized vessels.—The "sending in" of prizes was understood to involve the placing of a prize crew on board the vessel seized and the navigating of the vessel to the nearest convenient prize court, or the escorting of the vessel to such port by the capturing vessel. Detailed instructions were given for this action. In this action the will of the captain was substituted for that of the master of the seized vessel and the responsibility was correspondingly shifted.

Gradually, with the abolition of privateering, and the increase in size and speed of public and private vessels, the "sending in" of seized vessels became much more of a problem. A prize crew, if it could be spared, might

be unable to control the movements of a modern vessel of large tonnage, and a submarine could not spare a crew. Escorting a vessel under modern conditions where aid might be summoned by the seized vessel by radio would make the escorting perilous. The results of bringing the seized vessel in, either as to the material goods condemned to the captor, or kept from the other belligerent, would ordinarily be slight as compared to the loss of time and the risk involved in the operation.

The risk of attack by submarine or other hostile force during the "delivering up" of goods at sea has made this procedure of doubtful value and expediency in most cases.

It was but natural that other methods should be suggested and resorted to in recent years, when the character of vessels of war and of peace had become so unlike in many respects as compared with those of the early nineteenth century.

Recent practice and suggestions.—Article 48 of the unratified Declaration of London of 1909 embodied the general opinion of that period upon the treatment of neutral vessels seized as prize. It said that:

"A captured neutral vessel is not to be destroyed by the captor, but must be taken into such port as is proper in order to determine there the rights as regards the validity of the capture."

Article 49, however, made an exception in regard to a vessel which would be liable to condemnation in case the taking in of the seized vessel "would involve danger to the ship of war or to the success of the operations in which she is at the time engaged." In the general report of the conference, which had official weight, it was held that danger must exist "at the moment when the destruction takes place." The argument being in part that as the ship was already practically lost to the owner, being liable to condemnation, it would involve no further loss to him but would constitute the destruction of belligerent property by the belligerent. Article 50 provided for placing the persons on board and the ship's papers in safety

before destruction, and the exceptional emergency had always to be proved before any suit for condemnation would have effect, and this was to be proved "in a manner to meet the opposition of the neutral"; otherwise compensation was due the neutral. Other liabilities also guarded against destruction, and for innocent goods destroyed compensation must be made. There had been much discussion of this subject. Lord Stowell in 1819 had declared that destruction could be justified only "by a full restitution in value", (*The Felicity*, 2 Dodson Admiralty Reports, 381) and there had been a general opinion against destruction (1911 Naval War College, International Law Situations, pp. 51–98). The Italian Government had applied the provisions of the Declarations of London in its war with Turkey in 1911.

As the Declaration of London was operative only during the early weeks of the World War, new considerations arose.

It was proposed by some that each merchant vessel should be examined prior to departure from a port, and be certified as to the character and as to the nature of its cargo, thus putting a heavy burden and responsibility upon the neutral. The difficulty of effective enforcement of any such insurance as to the nature of a cargo was often evident during the period while the prohibition of importation of alcohol into the United States was in force. It was also evident that one of the belligerents might be benefited while the other might be injured by such a rule, and that in some cases weak states not accustomed to being or not able to be self-sufficient might be placed at great relative disadvantage or be put to great expense to become self-sufficient in materials essential in time of war.

Sequestration in a neutral port pending the decision of a prize court was frequently proposed before and during the World War, and there were some treaties which provided for such sequestration. It has been argued with some force that during the World War the position

of Great Britain and its allies would have been strengthened if sequestration had been the rule on the ground that neutral shipping which was sunk might have been sequestrated for a time, and innocent cargo and shipping would have been freed. In any case there would have been less irritation of neutrals, and with ships which had been sequestrated in their ports there would be possibilities of bringing pressure upon belligerents disregarding the laws of war.

Such a proposition as this, made in regard to sequestration, may, as is the case in the proposition in regard to certification, be an indirect recognition that destruction of a seized vessel is approved. Destruction, according to accepted law is unlawful, save under very exceptional circumstances. Another and frequently made suggestion has been that submarines be banned, but this suggestion need not be seriously considered while naval treaties embody present provisions.

The rule as embodied in article 22 of the London Naval Treaty, 1930, practically restricts the use of the submarine to that of a surface cruiser as regards vessels of commerce, while leaving the submarine unrestricted as regards vessels of war, making it once more essential that vessels of war and vessels of commerce be clearly distinguished and distinguishable. It cannot easily be presumed that armed merchant vessels could be tolerated while submarines should be required to conform to article 22.

Delivery of contraband.—The subject of delivery of contraband at sea was considered at length in International Law Situations, 1911, pages 99–110. It was there shown that early treaties permitted masters of merchant vessels to "agree, consent, and offer to deliver" contraband goods, when these formed a part of the cargo, after which they might proceed.

Gradually, limitations began to be inserted recognizing the difficulties of delivering cargoes at sea, as in article

18 of the treaty between the United States and Brazil, of 1828, in which it was said:

". . . No vessel of either of the two nations shall be detained on the high seas on account of having on board articles of contraband, whenever the master, captain, or supercargo of said vessels will deliver up the articles of contraband to the captor, unless the quantity of such articles be so great and of so large a bulk that they cannot be received on board the capturing ship without great inconvenience; but in this and all the other cases of just detention the vessel detained shall be sent to the nearest convenient and safe port, for trial and judgment, according to law." (8 U. S. Statutes, p. 394.)

Provisions to the same effect appear in many treaties of the nineteenth century, but toward the end of the century there was a growing support for the position that prize court proceedings should be essential in the change of title to goods seized as prize. Article 44 of the unratified Declaration of London, 1909, provided for the delivery of contraband under certain circumstances if it was not of an amount sufficient to make the vessel itself liable to condemnation. Other provisions in regard to delivery of contraband at sea were also discussed, but difficulties of a practical nature were often advanced in opposition to the extension of the practice by general agreement of the naval powers.

The actual form upon which the London Naval Conference agreed in the Declaration of London in 1909 was as follows:

"ARTICLE 44. A vessel stopped because carrying contraband, and not liable to condemnation on account of the proportion of contraband, may, according to circumstances, be allowed to continue her voyage if the master is ready to deliver the contraband to the belligerent ship.

"The delivery of the contraband is to be entered by the captor on the logbook of the vessel stopped, and the master of the vessel must furnish the captor duly certified copies of all relevant papers.

"The captor is at liberty to destroy the contraband which is thus delivered to him." (1909 Naval War College, International Law Topics, p. 95.)

The report of the British delegation to Sir Edward Grey showed the course of discussion at the conference, and some of the reasons for the adoption of article 44.

"18. Careful consideration was given to the question, raised in paragraph 33 of our instructions, whether any satisfactory arrangement could be devised for allowing the immediate removal by the captor of any contraband found on board a neutral vessel. Proposals were put forward by several delegations. The most far-reaching one was one submitted by Austria-Hungary, under which the neutral vessel carrying contraband was to be given the right to proceed on her way without further molestation if the master was ready to hand over the contraband to the captor on the spot, a proviso being added which made it necessary that the subsequent decision of a prize court should intervene in order either to validate the transaction or to decree compensation where the captor should have been proved to have acted wrongfully. In this form, the proposal did not meet with general support. It was objected that to concede an absolute right in the terms to the neutral would constitute an unjustifiable interference with the legitimate rights of belligerents, and that, moreover, the rule would be found in practice unworkable. The Conference therefore fell back upon the clause now embodied in the Declaration as article 44, which goes no further than authorizing the handing over of contraband, or its destruction, on the spot, by common agreement between captor and neutral, subject to the subsequent reference of the case to the prize court. It is not anticipated that it will be possible to apply this rule in very numerous instances, as, under modern conditions of maritime commerce, the transshipment or destruction of cargo on the high seas is likely in most cases to present serious or insuperable difficulties. But, so far as it goes, the rule may afford a welcome measure of relief in favorable circumstances. (Parliamentary Papers, Miscellaneous, No. 4, 1909, International Naval Conference, Cd. 4554, p. 97.)

Regulations during the World War.—The instructions to naval officers in the period 1914–1918 and earlier in the nineteenth century contain provisions embodying in large measure the principles of the Declaration of London. This is evident in such provisions as the Japanese regulations governing capture at sea of 1914, article 70 of which provides:

"A vessel stopped because carrying contraband, and not liable to condemnation on account of the proportion of contraband, may, according to circumstances, be allowed to continue her voyage if the master is ready to deliver the contraband to the belligerent ship. The delivery of the contraband is to be entered by the captor on the log book of the vessel stopped, and the master of the vessel must furnish the captor duly certified copies of all relevant papers. The captor shall prepare a document in duplicate according to Form No. 6 with regard to kinds of contraband and shall give one copy to the master of the vessel. The captor is at liberty to destroy the contraband which is thus delivered to him." (1925 Naval War College, International Law Documents, p. 166.)

The Instructions issued by the United States in June 1917, article 86, provide that "if circumstances preclude such delivery of the contraband cargo, the vessel should in general be sent in."

Difficulties of delivering cargoes at sea.—At the time when treaties relating to the delivery of cargoes at sea were made, from the seventeenth to the middle of the nineteenth century, there was a considerable equality in size and in other respects between vessels engaged in war and vessels engaged in commerce. Often the amount of cargo liable to condemnation, if the merchant vessel should be taken in, might be insignificant as compared with the whole cargo, or as compared with the expense or inconvenience of taking the vessel in even though there was no question as to the strict right to take the vessel to a prize court. With view to meeting such conditions without unduly inconveniencing either party, these early treaties inserted such provisions as article 7 of the treaty of February 24, 1676–77, between Great Britain and France, which said:

"If the vessel is laden but in part with contraband goods, and the master thereof offers to put them in the captor's hands, the captor shall not then oblige him to go into any port, but shall suffer him to continue his voyage." (1911 Naval War College, International Law Situations, p. 100.)

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It was early recognized that there might be grave risks and possibilities of irregularities if delivery of cargo at sea was not carefully safeguarded, and later treaties were elaborated to meet these contingencies. Gradually, such treaty provisions became less frequent, but regulations for the conduct of naval war even during the World War provided for delivery of cargo at sea. Some of these follow closely article 44 of the unratified declaration of London of 1909, and provide that the commander of the visiting vessel may destroy the contraband which has been delivered to him.

It was maintained that resort to delivery of contraband subjected the visiting vessel to undue risk, as the change in conditions due to speed of vessels, use of radio, and of submarines and other modern instruments in war rendered the reasons for delivering up of contraband at sea no longer valid. Even if this be true, it was contended that this did not give one belligerent a right to change the laws of war during the period of war. Then belligerents began to advance the doctrine of reprisal as basis of their acts, disregarding the fact that reprisal gave no ground for limiting the rights of neutrals, though neutrals might be liable to inconvenience or other incidental consequences of acts of reprisal aimed directly at one belligerent by the other.

"*Proceed as directed.*"—In the unratified treaty in relation to the use of submarines and noxious gases in warfare, drawn up at the Washington Conference in 1922, under article I was the clause:

> "A merchant vessel must not be attacked unless it refuse to submit to visit and search after warning, or to proceed as directed after seizure."

The Institute of International Law in 1913 differentiated seizure and capture: Seizure in time of war is the taking possession of a vessel or goods with or without the assent of the master, not necessarily involving bringing the matter to a prize court; capture implies that the authority of the captor is substituted for the authority

of the master of the captured vessel, though the ultimate disposition of the vessel and cargo may rest in the prize court. The definitions of the Institute imply that seizure when applied to a cargo may involve detaining the vessel pending decision of the prize court upon the liability of the cargo to condemnation.

There may be exigencies which would justify seizure of a neutral merchant vessel and immediate use of a part or the whole of its cargo, but these exigencies should be immediate and compelling and in such cases inventories must be made and care must be taken to avoid liabilities other than for payment for cargo taken.

Such statements as were made in regard to seizures in British orders in council during the World War were not statements of new principles of international law, but of what the British authorities proposed to do or what they had done when neutrals confined their opposition to the writing of notes protesting such practices. Referring to the period subsequent to the German war zone declaration of January 31, 1917, the British War Cabinet reported:

"Two steps were taken to deal with the situation. In the first place the Blockade Order in Council of the 16th February, 1917, was issued, the effect of which was to make vessels trading to and from neutral ports in Europe liable to the risk of capture and condemnation if they were found attempting to evade calling for examination at a British port; and, in the second place, it was announced through the public press that neutral vessels would, on certain conditions, be allowed the privilege of calling for examination at certain British ports outside the United Kingdom such as Halifax in Nova Scotia instead of at Kirkwall, and that British bunker coal would only be allowed to those neutral vessels which undertook to call at an appointed British port and perform certain services in return. Concurrently with these measures insurance on favorable terms was laid open to all vessels engaged in trading in the Allied interests, and His Majesty's Government further offered to hire or purchase large blocks of neutral shipping.

"These expedients have, on the whole, worked exceedingly well. There has been no serious attempt to break the blockade; and, on the other hand, the power to give or refuse what are called Halifax

facilities—that is to say, the privilege of being examined outside the danger zone—has furnished us with a powerful inducement to neutral shipowners to comply with the various blockade and shipping requirements that we have put forward." (1918 Naval War College, International Law Documents, p. 94.)

While there was in international law no rule requiring neutral vessels voluntarily to go to a belligerent port of either belligerent for examination, such action might be made advantageous by exempting from liability the vessels which had conformed to the order, or coal and other supplies might be withheld from vessels which had not conformed to the order. If neutral vessels proceed to belligerent ports for examination for their own convenience or advantage, they cannot complain on account of delay or risks encountered. Neither can they complain if on reasonable suspicion they are taken in by a prize crew or escorted in by a vessel of the belligerent forces.

The ordering of a neutral merchant vessel to proceed to a named port without prize crew or escort is beyond the legal competence of a belligerent, and the merchant vessel incurs no liability for disregarding such order and is under no obligation to agree to proceed by itself to a port named by a belligerent visiting vessel.

If the submarine had the right to order the *Saba* to agree to proceed to port Xena of state X under penalty of being sunk, it might be maintained that the submarine might by radio transmit such orders to all neutral merchant vessels at sea, and then sink such as were not obeying the order. Manifestly no such practice is upheld by international law.

The obligation to "proceed as directed" would therefore, if within the lawful rights of belligerents, imply that the directing force was on board the neutral merchant vessel in a prize crew or escorting the vessel as by an accompanying cruiser.

Threat by government agent.—The commander of the submarine is a government agent of the state. His word

is in effect the expression of the will of his state. State X is responsible for the acts of the commanders of its submarines. The master of the *Saba* may know that a submarine commander's right to regulate the movements of a neutral merchant vessel under the circumstances prevailing in the case of the *Saba* are limited to placing a prize crew on board, or escorting the *Saba* to port, thus maintaining a continuing effective control.

The authority of the commander of a belligerent vessel of war is limited by the degree of force at his disposal. If he cannot spare a prize crew, or cannot leave the area of his operations to escort a prize to port, he must release the vessel and any action beyond this is in excess of his lawful authority, unless permitted by treaty agreement to which the belligerent state and the neutral state concerned are parties. The *Saba* would be under obligation by treaty to "deliver up" the contraband. The *Saba* would be under no lawful obligation to agree to change its course or to proceed to Xena, nor would an agreement made under such compulsion be valid.

The commander of the submarine has no lawful authority to make or to enforce a threat to sink the *Saba* because it does not agree to change its course and proceed to Xena.

SOLUTION

(*a*) The *No. 5* was on a lawful voyage when met by the *Yoba*.

The *Yoba* could seize the *No. 5* and bring her to a prize court of Y.

Except in the case of urgent military necessity conversion before adjudication would not be lawful and in any case full compensation must be made for N's loss.

(*b*) The *No. 5* after installing its equipment in state M and sailing for state X should be brought to a prize court.

Except in case of urgent military necessity conversion before adjudication would not be lawful.

States N and M have no responsibility nor would Y have any responsibility as the *No. 5* is bound for X, a belligerent destination.

(*c*) The *No. 6* should be interned by state R.

The construction of the *No. 6* in state R is lawful.

(*d*) The *Saba* is under legal obligation to "deliver up" the contraband. The *Saba* is under no legal obligation to agree to change its course and to proceed to port Xena, though it would be under obligation to go if accompanied by the submarine or in control of a prize crew.

Situation III

INLAND STATE AT WAR

States X and Y are at war. All states other than state D declare neutrality. State Y has no seacoast. The Black River is the common boundary of X and Y for 100 miles. Y has private merchant vessels and aircraft under its flag. All vessels and aircraft of Y are registered at Yara, the capital of Y. Some of the merchant vessels of Y have had their decks strengthened so that they may take on 6-inch guns. Some of these vessels have already installed these guns. X has vessels and aircraft of the same character under its flag.

(*a*) State A under its proclamation of neutrality excludes from its waters both types of vessels of X and Y, and all vessels of war and vessels assimilated thereto.

(*b*) State B refuses to admit vessels of X and Y with prize.

(*c*) State C, adjoining state Y, refuses to permit an aircraft of Y to fly over its territory to a vessel of Y which is at sea.

(*d*) State D, a maritime state, refuses to grant to either X or Y any rights which might flow from a declaration of war or to accept any neutral obligations so far as aerial or maritime acts are concerned, on the ground that the war must be confined to the land territory of X and Y.

What are the lawful rights of the parties—

(1) If the Black River is navigable to Yara?

(2) If the Black River is not navigable to any point in state Y?

SOLUTION

(*a*) State A may lawfully in its proclamation of neutrality exclude all vessels of war and vessels assimilated thereto. This would apply to armed merchant vessels, but ordinarily not to unarmed merchant vessels whether or not decks had been strengthened.

(*b*) State B may lawfully refuse to admit vessels of war of X and Y with prize except on account of unseaworthiness, stress of weather, or lack of fuel or supplies.

(*c*) State C may lawfully refuse to permit aircraft of Y to fly over its territory to a vessel of Y which is at sea.

(*d*) State D may not lawfully refuse to grant to X and Y rights which might flow from a declaration of war or refuse to accept any neutral obligations so far as aerial or maritime acts are concerned though the geographical location of state D might make special regulations justifiable.

NOTES

Status in time of conflict.—The recognition of belligerent and of neutral status has been of slow growth. The recognition of belligerent status and the gradual determination of the rights appertaining to this status can be traced before the sixteenth century but from that time the recognition is clear and the determination of rights is marked. Gentilis (1588) defined war as "a properly conducted contest of armed public forces." (De jure belli, bk. I, ch. 2.) Since that time further attempts have been made to set bounds to the status of belligerency, such as regards the beginning of war in the Hague Convention III, 1907, providing that hostilities between the contracting parties should "not commence without previous and explicit warning" and in Convention II providing against the employment of force for the recovery of contract debts claimed from one government by another government as due to its nationals unless the debtor state fails

to respond to arbitral methods. These limitations upon time and cause of war have in practice seemed to meet general approval. Other attempts to limit the actual conduct of war have also been elaborated and even in the strain of the time of belligerency the conventions relating to the rules and customs of war on land and sea have in large measure been respected and departures from these rules have been widely condemned.

The laws of neutrality have been developing and many of these were embodied in the Hague conventions of 1899 and 1907 and in the unratified Declaration of London of 1909. The Declaration of Paris of 1856 has received approval of most of the states of the world.

The rules of war and of neutrality, written and unwritten, have been the subject of many court decisions which serve to define the limits of lawful action.

Diplomatic and other negotiations have also clarified the understanding and application of these rules.

The rules and customs of war on land and sea at any particular period have not been found clearly applicable to every problem to which war might give rise, but considering difference in character and interests of the parties at war, the effect has been generally approved as aiding in progress toward removing of grounds of international friction. Sudden and marked attempts to change established rules have unsettled conditions and multiplied the possibilities of friction and misunderstandings. International laws of war and of neutrality have tended to regard custom and precedent while recognizing the force of changing conditions.

It is true that at times a state has conceived that its interests might be better served by a course of action not in accord with international law, but such a condition has not been regarded in practice or in the courts as sufficient ground for setting aside accepted law or for proclaiming a purpose of following a policy at wide variance with international law though exceptional conditions have

been from time to time admitted as ameliorating obligations.

War and neutrality.—When two or more states are at war, other nonparticipating states are generally neutral. It is customary for states to issue declarations of neutrality, often outlining the course of conduct they propose to follow. If the neutral states are strong, the course of conduct prescribed in the proclamations will probably be followed. If the neutral states are weak or timid or both, the belligerents will tend to override the prescriptions whenever it can be advantageously done.

While it is presumed that states which take no part in the war are neutral, it is not necessarily true that uncertainty may not arise in case a declaration does not exist, is withdrawn, or modified.

There are rules which are accepted as generally binding, yet from the nature of conditions in different areas special regulations may be reasonable and neutrality regulations have varied greatly.

The content of the idea of neutrality is not fixed and no concept of neutrality has existed sufficiently long to make its continuance assured. Grotius in his great treatise, *De Jure Belli ac Pacis*, in 1625 gave little attention to the subject, but Bynkershoek early in the next century gave a good definition of neutrality, a status which was then in fact uncommon in interstate relations. At the end of the eighteenth century the idea of neutrality was somewhat further defined by the practice of the United States following the proclamation of Washington of December 3, 1793, in which, while not mentioning "neutrality", he asserts that the United States "should with sincerity and good faith adopt and pursue a conduct friendly and impartial toward the belligerent powers." Neutrality laws were subsequently enacted by many states. The fundamental idea was as Bynkershoek said to be "of neither party."

It has been pointed out that in some conditions an attitude of impartiality might be as valuable as an alli-

ance. This might be the case when one of the belligerents lacked entirely an article essential to the conduct of war which a nearby neutral could furnish in unlimited quantity without risk of interference from the other belligerent. Such situations have given rise to discussions in regard to the obligations of neutrals to accommodate their conduct to the geographic relationship of the belligerents, so that one might not be benefited more than the other.

Protests have been made by one belligerent to the effect that the nationals of a neutral should not sell to another belligerent goods which were of a nature to aid in carrying on the war, particularly if the protesting belligerent was not in position to take advantage of such trade. Such protests have not been regarded as valid as is evident in the correspondence during war.

A circular of the Department of State of the United States early in the World War, October 15, 1914, states:

"In the first place it should be understood that, generally speaking, a citizen of the United States can sell to a belligerent government or its agent any article of commerce which he pleases. He is not prohibited from doing this by any rule of international law, by any treaty provisions, or by any statute of the United States. It makes no difference whether the articles sold are exclusively for war purposes, such as firearms, explosives, etc., or are foodstuffs, clothing, horses, etc., for the use of the army or navy of the belligerent.

"Furthermore, a neutral government is not compelled by international law, by treaty, or by statute to prevent these sales to a belligerent. Such sales, therefore, by American citizens do not in the least affect the neutrality of the United States.

"It is true that such articles as those mentioned are considered contraband and are, outside the territorial jurisdiction of a neutral nation, subject to seizure by an enemy of the purchasing government, but it is the enemy's duty to prevent the articles reaching their destination, not the duty of the nation whose citizens have sold them. If the enemy of the purchasing nation happens for the time to be unable to do this that is for him one of the misfortunes of war; the inability, however, imposes on the neutral government no obligation to prevent the sale." (1916 Naval War College, International Law Topics, p. 95.)

Status of Brazil, 1917.—Brazil by Decree of August 4, 1914, declared its neutrality, broke diplomatic relations with Germany, April 11, 1917, revoked its neutrality, June 4, 1917, and declared war against Germany, October 26, 1917. There was uncertainty as to the status of Brazil during the period from June 4, 1917, when Brazil revoked its neutrality and October 26, 1917, when Brazil declared war. The note on revocation of neutrality of June 4, 1917, as addressed by the Brazilian Ambassador to the Secretary of State of the United States was as follows:

"WASHINGTON, *June 4, 1917.*

"MR. SECRETARY OF STATE: The President of the Republic has just instructed me to inform your excellency's Government that he has approved the law which revokes Brazil's neutrality in the war between the United States of America and the German Empire. The Republic has thus recognized the fact that one of the belligerents is a constituent portion of the American Continent and that we are bound to that belligerent by traditional friendship and the same sentiment in the defense of the vital interests of America and the accepted principles of law.

"Brazil ever was, and is now, free from warlike ambitions, and while it always refrained from showing any partiality in the European conflict, it could no longer stand unconcerned when the struggle involved the United States actuated by no interest whatever but solely for the sake of international judicial order and when Germany included us and the other neutral powers in the most violent acts of war.

"While the comparative lack of reciprocity on the part of the American republics has hitherto divested the Monroe Doctrine of its true character, permitting an interpretation based on the prerogatives of their sovereignty, the present events, now bringing Brazil to the side of the United States at a critical moment in the history of the world, continue to impart to our foreign policy a practical form of continental solidarity; a policy, however, which was also that of the former régime whenever one of the other sister friendly nations of the American Continent was concerned. The Republic has strictly observed our political and diplomatic traditions and remained true to the liberal principles in which the nation was nutured.

"Thus understanding our duty, and taking the position indicated by Brazil's antecedents and the conscience of a free people,

whatever developments the morrow may have in store for us, we shall conserve the constitution which governs us and which has not yet been surpassed in the guaranties due to the rights, lives, and property of foreigners.

"In bringing the above stated resolution to your excellency's knowledge I beg you to be pleased to convey to your Government the sentiments of unalterable friendship of the Brazilian people and Government.

DOMICIO DA GAMA."

(Foreign Relations, 1917, Supplement I, p. 294.)

In acknowledging this communication from Brazil the acting Secretary of State of the United States said:

"WASHINGTON, *June 16, 1917.*

"Excellency: I have the honor to acknowledge the receipt of your note of June 4, by which, in pursuance of instructions from the President of Brazil, you inform me of the enactment of a law revoking Brazil's declaration of neutrality in the war between the United States and Germany, and request me to convey to this Government the sentiments of unalterable friendship of the Brazilian people and Government.

"I have received with profound gratification this notification of the friendly cooperation of Brazil in the efforts of the United States to assist in the perpetuation of the principles of free government and the preservation of the agencies for the amelioration of the sufferings and losses of war, so slowly and toilfully built up during the emergence of mankind from barbarism.

"Your Government's invaluable contribution to the cause of American solidarity, now rendered more important than ever as a protection to civilization and a means of enforcing the laws of humanity, is highly appreciated by the United States.

"I shall be glad if you will be good enough to convey to the President, the Government, and the people of Brazil, the thanks of this Government and people for their course, so consistent with the antecedents of your great and free nation and so important in its bearing on issues which are vital to the welfare of all the American republics.

"Requesting that you will also assure your Government and people of most cordial reciprocation by the Government and people of the United States of their assurances of friendship, always so greatly valued, and now happily rendered still warmer and closer by the action of Brazil, I avail my self [etc.].

(Ibid., p. 300.)

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Other South and Central American States took action of a similar nature supporting American solidarity. Some of these states were unable to engage in aggressive hostilities toward Germany but did not maintain neutrality, and by permitting use of ports to the Allies and by other conduct manifested an attitude of passive hostility toward the Central Powers.

Apparently even in Brazil the breaking of diplomatic relations and the expression toward the United States of "the sentiments of unalterable friendship of the Brazilian people and Government" did not involve definite participation in the war for it was not till more than 4 months later that Brazil declared war against Germany. The Department of State of the United States announced on October 26, 1917, that it had been informed that the Brazilian Senate at 6:20 o'clock, Friday afternoon, October 26, 1917, had voted the declaration of war against Germany which had been approved by the Chamber at 3 o'clock.

"A state of war between Brazil and the German Empire, provoked by the latter, is hereby recognized and proclaimed, and the President of the Republic, in accordance with the request contained in his message to the National Congress, is hereby authorized to take such steps for the national defense and public safety as he shall consider adequate, to open the necessary credits and to authorize the credit operations required. All previous measures to the contrary are hereby revoked." (Ibid., p. 65.)

There was thus a period under neutrality regulations, August 4, 1914, to June 4, 1917, during a part of which, April 11 to June 11, 1917, diplomatic relations with Germany were severed. This period was followed by a period during which diplomatic relations were still severed and neutrality revoked and a recognition of the American "continental solidarity" was announced and a spirit of friendship for the United States was expressed but without declaration of war till October 26, 1917.

Costa Rica in World War, 1914–18.—In spite of the refusal of the United States to recognize the revolutionary

government of Tinoco in Costa Rica in 1917, Tinoco's Secretary of State for Foreign Affairs informed the American Minister to Costa Rica of the attitude of the government of Tinoco, April 3, 1917:

"Government of Tinoco expresses desire to make known that without taking into account recognition on behalf of the Government of the United States in any emergencies which arise between Germany and the United States by reason of the relations in which these two countries find themselves to-day, Government of Costa Rica not only is disposed to observe towards the United States a benevolent neutrality but also to prevent development upon its territory of any hostility against them." (Foreign Relations, U. S., 1917, Supplement 1, p. 243.)

Like Brazil, Costa Rica expressed in a note of April 9, 1917, the idea of American "solidarity" and also offered the use of its ports and waters to the navy of the United States. Costa Rica did not, however, break diplomatic relations with Germany till September 1, 1917, and declared war on May 24, 1918.

State without seacoast.—There has been some argument that when a state without a seacoast is at war with a state having a seacoast, other maritime and neutral states should in their neutrality proclamations embody such restrictions as would equalize the conditions of the belligerent states as respects commerce. Such a practice might imply that the neutral maritime states should prohibit commerce in articles of contraband and destined to the belligerent maritime state while territorially adjacent states might carry on commerce with both belligerents. The doctrine of continuous voyage has become too well established to easily adapt itself to such conditions. If the landlocked state is to be permitted to have its flag upon the sea and upon aircraft above the sea, it might create a privileged position for the state without a seacoast and this geography does not do.

World War treaties on flags.—The Treaty of Versailles, June 28, 1919, made provision for the recognition of flags flown by vessels of states having no seacoast.

Article 273 stated:

"In the case of vessels of the Allied or Associated Powers, all classes of certificates or documents relating to the vessel, which were recognized as valid by Germany before the war, or which may hereafter be recognized as valid by the principal maritime States, shall be recognized by Germany as valid and as equivalent to the corresponding certificates issued to German vessels.

"A similar recognition shall be accorded to the certificates and documents issued to their vessels by the Governments of new States, whether they have a sea-coast or not, provided that such certificates and documents shall be issued in conformity with the general practice observed in the principal maritime States.

"The High Contracting Parties agree to recognise the flag flown by the vessels of an Allied or Associated Power having no sea-coast which are registered at some one specified place situated in its territory; such place shall serve as the port of registry of such vessels." (1919 Naval War College, International Law Documents, p. 120.)

By article 153 of the Treaty of Neuilly, November 27, 1919, Bulgaria agrees to the same provisions as to the flag as those in the Treaty of Versailles. Article 225 of the Treaty of Saint-Germaine-en-Laye, September 10, 1919, contained the same provision relating to Austria except that the words "any contracting party" were substituted for the words "an Allied or Associated Power." This article was identical with article 209 of the Treaty of Trianon, June 4, 1920, with Hungary.

In article 102 of the Treaty of Lausanne, July 24, 1923, Turkey undertakes to adhere to the Barcelona Convention of April 20, 1921.

Barcelona Convention, 1921.—The regulation of transit on land and sea was at the close of the World War regarded as a matter of capital world importance. A conference for the purpose of reaching agreement on this subject was held at Barcelona early in 1921, and on April 20 reached the following agreement as to the use of the national flag upon vessels belonging to states which have no seacoast:

"The undersigned, duly authorised for the purpose, declare that the States which they represent recognise the flag flown by

the vessels of any State having no seacoast which are registered at some one specified place situated in its territory; such place shall serve as the port of registry of such vessels.

"Barcelona, April the 20th, 1921, done in a single copy of which the English and French texts shall be authentic." (7 LNTS, p. 73; 1924 Naval War College, International Law Documents, p. 83.)

Article XIV, Washington Treaty, 1922.—Article XIV of the Washington Treaty of 1922 on the Limitation of Naval Armament provided that:

"No preparations shall be made in merchant ships in time of peace for the installation of warlike armaments for the purpose of converting such ships into vessels of war, other than the necessary stiffening of decks for the mounting of guns not exceeding 6 inch (152 millimetres) calibre." (1921 Naval War College, International Law Documents, p. 299.)

This article did not receive much attention in the way of discussion in the Washington Conference. It constitutes a limitation upon construction in the time of peace of vessels which might be converted in time of war. Such vessels might be treated by the opposing belligerent as potential auxiliary vessels, but there would not necessarily be any evidence apparent to a neutral which would be convincing as to the nature of the vessel.

Under article XIV a belligerent finding a merchant vessel of an enemy, the decks of which are stiffened for the mounting of guns, would be competent to decide upon the treatment of such a vessel as a potential vessel of war.

In the Second Hague Conference, 1907, the convention relating to the status of enemy merchant ships at the outbreak of hostilities stated in article 5 that the article relating to days of grace for enemy merchant ships "does not affect merchant ships whose build shows that they are intended for conversion into warships." This article seems to be entirely reasonable, as a belligerent could not be expected to grant release to an enemy vessel which is in his power and which if released is adapted to conversion into an enemy vessel of war.

A belligerent would not only have the right to inspect a merchant vessel of an enemy in order to determine whether it is adapted for conversion into a vessel of war, but this would also seem to be an essential precaution.

A neutral in the ordinary exercise of due diligence would, however, be concerned with the entrance and sojourn within its waters of vessels of belligerents which had already been converted into vessels of war or which from external appearances were to be used for hostile purposes. There is no obligation resting upon a neutral to make an examination of the structural character of a ship before permitting it to enter its ports nor can a neutral be expected to know the intention as to the ultimate use of a vessel which may enter or be in its ports. If a belligerent vessel, with guns mounted or from its external appearance already adapted to engage in hostilities, enters a neutral jurisdiction, the neutral may prescribe or deny it such privileges as may correspond to the neutral's conception of its obligations or rights. The neutral state may forbid the use of its waters to "vessels of war or vessels assimilated thereto" and if permitting entrance, may prescribe the conditions of sojourn.

It is also for the neutral state to determine what vessels are assimilated to vessels of war. The attitude of a neutral state may depend upon many circumstances, such as geographical proximity, commercial relations, etc. If the merchant vessels of X, having decks stiffened for the mounting of guns, have all been built in neutral state N, it may be presumed that state N may know of this or may have it brought to its attention. By article XIV of the Washington Convention, the purpose of stiffening of decks is stated and state N may be desirous of avoiding any act or failure to act which might imply a nonfulfillment of neutral obligations.

Admission of vessels of war.—Hall in referring to a vessel converted by government commission into a public vessels says:

"But though, if a vessel so commissioned is admitted at all within the ports of the neutral, it must be accorded the full privileges attached to its public character, there is no international usage which dictates that ships of war shall be allowed to enter foreign ports, except in cases of imminent danger or urgent need. It is fully recognised that a state may either refuse such admission altogether, or may limit the enjoyment of the privilege by whatever regulations it may choose to lay down" (International Law, 8th edition, p. 746.)

Regulation of entrance of vessels of war.—Neutrals have maintained the right to regulate the entrance and sojourn of vessels of war. The regulations have sometimes been drawn up before the war and sometimes proclaimed after the war. Objections have been raised to regulations proclaimed after the war but these have not been sustained because a neutral has the right to take action for preserving its neutrality.

Identic rules were agreed to by Denmark, Norway, and Sweden in December 1912 as follows:

"War vessels of belligerent powers are permitted to enter ports and roadsteads as well as other territorial waters of the kingdom. At the same time admission is subject to the exceptions, restrictions, and conditions which follow:

"1. (a) It is forbidden belligerent war vessels to enter the ports and roadsteads of war, which have been proclaimed as such.

"(b) It is also forbiddent such vessels to enter territorial waters whose entrances are closed by submarine mines or other means of defense.

"(c) The King reserves the right to forbid under the same conditions to the two belligerent parties, access to other Norwegian ports or roadsteads and other defined parts of the interior Norwegian waters, when special circumstances demand and for safeguarding the sovereign rights of the kingdom and to maintain its neutrality.

"(d) The King also reserves the right to forbid access to ports and roadsteads of the kingdom to belligerent war vessels which have neglected to conform to rules and prescriptions promulgated by the competent authorities of the kingdom and which have violated its neutrality." (1917 Naval War College, International Law Documents, p. 184.)

Vessels assimilated to vessels of war.—The treatment of vessels assimilated to vessels of war has varied in

many ways and in different states. The practice in regard to armed merchant vessels was somewhat fully considered at the Naval War College in 1927 (1927 Naval War College, International Law Situations, pp. 73–105), showing wide divergence in practice and a drift toward treating armed merchant vessels under the same rules as vessels of war.

Many states put restrictions upon the entrance of vessels which might from their equipment participate in the war either directly by engaging in hostilities or indirectly by supporting the belligerents as auxiliaries. Certain states permitting entrance of armed merchant vessels restricted such armament to defensive armament, but found difficulty in making the distinction between such vessels as were intended for purposes of war and those which were not so intended. So many controversies arose on this matter that the safe course seemed to be to treat armed vessels as vessels of war.

The Netherlands regulations of August 5, 1914, issued before the controversy had become acute, state:

"ARTICLE 4. No warships or ships assimilated thereto belonging to any of the belligerents shall have access to the said territory."

An earlier proclamation of July 30, 1914, stated:

"ARTICLE 2. As long as the Order mentioned in Article I (Royal Order of October 30, 1909) is not in force, it is forbidden to war ships or similar vessels of foreign powers to enter the Netherlands territorial waters from the sea or to remain therein."

Of course regulations did not exclude ships in distress.

Territorial waters.—The proclamation excluding vessels of war and vessels assimilated thereto from territorial waters has been further complicated by varying attitudes upon the extent of territorial waters. While some states have accepted the 3-mile limit, other states have maintained claims to 4, 5, 6, 10, or more miles as the proper line. In the early part of the World War the Italian Ambassador at Washington in a note to the Secretary of State said on November 6, 1914:

"By note of August 13 last the Royal Embassy had the honor to inform your excellency that under a Royal decree of the 6th of that month the limit of territorial waters, for the purposes of neutrality, had been set at six nautical miles, and certain special rules were laid down for the delimitation of such territorial waters in bays, bights, and gulfs in accordance with Article 2 of said decree. In a subsequent note of September 8 the Royal Embassy quoted for your excellency's due information the text of the provisions contained in the said article of the Royal decree. Your excellency was pleased to acknowledge the said communications by your notes of August 17 and September 19.

"Whether because of the fact that the limits of the marginal sea are not regulated by international conventions or general rules of international law—thus leaving every state at liberty to fix them within the sphere of its own sovereignty without subjecting its decision to the recognition of the other states—or because of the fact that no comment was made by your excellency on the Royal Embassy's communications, His Majesty's Government knows that no objections are made by the Federal Government to the six-mile limit set by us on our territorial waters for the purpose of neutrality.

"Yet, with a view to removing any possible uncertainty, His Majesty's Government would be very thankful for a declaration which would explicitly convey acceptance by the Federal Government of the decision as adopted. And, in compliance with instructions I have just received on the subject, I have the honor to apply to your excellency's tried courtesy for such a declaration." (Foreign Relations, U. S., 1914, Supplement, p. 665.)

This note made it necessary for the United States to reply or tacitly to admit that 6 miles might be a lawful claim to jurisdiction. This the United States was unwilling to do and the reply from the Acting Secretary of State on November 28, 1914, was as follows:

"I have the honor to acknowledge receipt of your excellency's note of November 6, 1914, having reference to your previous notes of August 13 and September 8 last, the first of which notes contained announcement that by a Royal decree of the Italian Government, dated August 6, 1914, the limits of its territorial waters were set at six nautical miles from the shore, and the latter of which notes quoted the text of article 2 of that decree, prescribing rules for the determination of the territorial waters in the bays, bights, and gulfs which indent the Italian shore. Of these notes I had the honor to acknowledge receipt, respectively, on August 17 and September 19 last gone.

"In your note of November 6 your excellency says that in order to remove any possible uncertainty respecting the position of this Government, you will appreciate an explicit declaration on behalf of the United States accepting the decision of the Italian Government as embodied in the Royal decree referred to.

"I am compelled to inform your excellency of my inability to accept the principle of the Royal decree in so far as it may undertake to extend the limits of the territorial waters beyond three nautical miles from the main shore line and to extend thereover the jurisdiction of the Italian Government.

"An examination into the question involved leads to the conclusion that the territorial jurisdiction of a nation over the waters of the sea which wash its shore is now generally recognized by the principal nations to extend to the distance of one marine league or three nautical miles, that the Government of the United States appears to have uniformly supported this rule, and that the right of a nation to extend, by domestic ordinance, its jurisdiction beyond this limit has not been acquiesced in by the Government of the United States.

"There are certain reasons, brought forward from time to time in the discussion of this question and advanced by writers on international law, why the maritime nations might deem the way clear to extend this determined limit of three miles, in view of the great improvement in gunnery and of the extended distance to which, from the shore, the rights of nations could be defended; but it seems manifestly important that such a construction or change of the rule should be reduced to a precise proposition and should then receive in some manner reciprocal acknowledgment from the principal maritime powers; in fine, that the extent of the open or high seas should better be the result of some concerted understanding by the nations whose vessels sail them than be left to the determination of each particular nation, influenced by the interests which may be peculiar to it." (Ibid., p. 665.)

Internment of the "Farn", 1915.—Just what vessels may be included in the category of vessels assimilated to vessels of war has not been specifically determined. Armament or flag might be the determining factor in some cases, and conduct might be considered in other cases. Use was offered as the ground of internment of the *Farn* in 1915. The Secretary of State, in reply to a communication of the British Ambassador requesting the release of the *Farn* as being a prize brought into San Juan

and not departing at once in accord with article 21 of Hague Convention XIII, said:

"I have the honor to acknowledge the receipt of your excellency's note of the 26th ultimo in relation to the steamship *Farn*, or KD–3, which has been interned in the port of San Juan, Porto Rico, as a tender to a belligerent fleet. The Department is advised that the *Farn* left Cardiff about September 5, 1914, for Montevideo, with a clause in her charter to deliver coal to warships if they so desired. Though, as you state, the vessel was not employed as a collier, or otherwise, in the Admiralty service, this fact would not in the opinion of the Department affect her status at the time of internment if she indeed acted as a collier or auxiliary to a belligerent fleet. It is understood that the *Farn* was a British merchant vessel; that she had on board a cargo of Cardiff coal amounting to some 3,000 tons; that she was captured by the German cruiser *Karlsruhe* on October 5; that the cruiser placed a prize crew and officers on board; and that notwithstanding the known practice of the *Karlsruhe* to sink her enemy prizes, the vessel had been at sea continuously since the date of capture until she put into the port of San Juan on January 12 last for provisions and water. The Department believes that the only reasonable conclusion in the circumstances, is that between October 5 and January 12 the *Farn* was used as a tender to German warships. It appears obvious that a belligerent may use a prize in its service and that the prize thereby becomes stamped with a character dependent upon the nature of the service. It is upon this view of the case that the United States Government concluded to treat the vessel as a tender, which character accords with her presumed service to the German fleet." (Foreign Relations, U. S., 1915 Supplement, p. 823.)

Armed merchant vessel.—The problem of the armed merchant vessels perplexed neutrals during the World War and was the subject of many exchanges of diplomatic notes. A proposal which brought the issue clearly to the attention of the belligerents was made by Secretary Lansing in January 1916. The communication of January 18, 1916, which was sent to the British, French, and Russian ambassadors and the Belgian minister discusses the use of submarines in the war up to that date. This document, which has been often cited, contains comments on what Secretary Lansing terms "a doubtful legal right" and expresses the hope that the belligerents may

agree to a reciprocal and reasonable arrangement with view to ending submarine attacks upon merchant vessels:

"In order to bring submarine warfare within the general rules of international law and the principles of humanity without destroying its efficiency in the destruction of commerce, I believe that a formula may be found which, though it may require slight modifications of the practice generally followed by nations prior to the employment of submarines, will appeal to the sense of justice and fairness of all the belligerents in the present war.

"Your excellency will understand that in seeking a formula or rule of this nature I approach it of necessity from the point of view of a neutral, but I believe that it will be equally efficacious in preserving the lives of all non-combatants on merchant vessels of belligerent nationality.

"My comments on this subject are predicated on the following propositions:

1. A non-combatant has a right to traverse the high seas in a merchant vessel entitled to fly a belligerent flag and to rely upon the observance of the rules of international law and principles of humanity if the vessel is approached by a naval vessel of another belligerent.

2. A merchant vessel of enemy nationality should not be attacked without being ordered to stop.

3. An enemy merchant vessel, when ordered to do so by a belligerent submarine, should immediately stop.

4. Such vessel should not be attacked after being ordered to stop unless it attempts to flee or to resist, and in case it ceases to flee or resist, the attack should discontinue.

5. In the event that it is impossible to place a prize crew on board of an enemy merchant vessel or convoy it into port, the vessel may be sunk, provided the crew and passengers have been removed to a place of safety.

"In complying with the foregoing propositions which, in my opinion, embody the principal rules, the strict observance of which will insure the life of a non-combatant on a merchant vessel which is intercepted by a submarine, I am not unmindful of the obstacles which would be met by undersea craft as commerce destroyers.

"Prior to the year 1915 belligerent operations against enemy commerce on the high seas had been conducted with cruisers carrying heavy armaments. Under these conditions international law appeared to permit a merchant vessel to carry an armament for defensive purposes without losing its character as a private commercial vessel. This right seems to have been predicated on

the superior defensive strength of ships of war, and the limitation of armament to have been dependent on the fact that it could not be used effectively in offense against enemy naval vessels, while it could defend the merchantman against the generally inferior armament of piratical ships and privateers.

"The use of the submarine, however, has changed these relations. Comparison of the defensive strength of a cruiser and a submarine shows that the latter, relying for protection on its power to submerge, is almost defenseless in point of construction. Even a merchant ship carrying a small caliber gun would be able to use it effectively for offense against a submarine. Moreover, pirates and sea rovers have been swept from the main trade channels of the seas, and privateering has been abolished. Consequently, the placing of guns on merchantmen at the present day of submarine warfare can be explained only on the ground of a purpose to render merchantmen superior in force to submarines and to prevent warning and visit and search by them. Any armament, therefore, on a merchant vessel would seem to have the character of an offensive armament.

"If a submarine is required to stop and search a merchant vessel on the high seas and, in case it is found that she is of enemy character and that conditions necessitate her destruction, to remove to a place of safety all persons on board, it would not seem just or reasonable that the submarine should be compelled, while complying with these requirements, to expose itself to almost certain destruction by the guns on board the merchant vessel.

"It would, therefore, appear to be a reasonable and reciprocally just arrangement if it could be agreed by the opposing belligerents that submarines should be caused to adhere strictly to the rules of international law in the matter of stopping and searching merchant vessels, determining their belligerent nationality, and removing the crews and passengers to places of safety before sinking the vessels as prizes of war, and that merchant vessels of belligerent nationality should be prohibited and prevented from carrying any armament whatsoever.

"In presenting this formula as a basis for conditional declarations by the belligerent governments, I do so in the full conviction that your Government will consider primarily the humane purpose of saving the lives of innocent people rather than the insistence upon a doubtful legal right which may be denied on account of new conditions." (Foreign Relations, U. S., 1916, Supplement, p. 146.)

The American proposition was not adopted.

Admission of submarines.—The British Government set forth its opinion in regard to the closing of neutral ports to submarines in a communication to the Secretary of State on July 3, 1916:

"The enemy submarines have been endeavouring for nearly eighteen months to prey upon the Allied and neutral commerce, and throughout that period enemy governments have never claimed that their submarines were entitled to obtain supplies from neutral ports. This must have been due to the fact that they thought they would be met with a refusal and that hospitality could not be claimed as of right. The difficulty of knowing the movements or controlling the subsequent action of the submarines renders it impossible for the neutral to guard against any breaches of neutrality after the submarine has left port and justifies the neutral in drawing a distinction between surface ships and submarines. The latter, it is thought, should be treated on the same footing as seaplanes or other aircraft and should not be allowed to enter neutral ports at all. This is the rule prescribed during the present war by Norway and Sweden. Another point of distinction between surface ships and submarines should be borne in mind. A surface vessel demanding the hospitality of a neutral port runs certain inevitable risks; its whereabouts become known and an enemy cruiser can await its departure from port. This and similar facts put a check on the abuse by belligerant surface ships of neutral hospitality. No such disadvantages limit the use to which the Germans might put neutral ports as bases of supplies for submarine raiders.

"For these reasons, in the opinion of His Majesty's Government, if any enemy submarine attempts to enter a neutral port, permission should be refused by the authorities. If the submarine enters it should be interned unless it has been driven into port by necessity. In the latter case it should be allowed to depart as soon as necessity is at an end. In no circumstances should it be allowed to obtain supplies.

"If a submarine should enter a neutral port flying the mercantile flag His Majesty's Government are of opinion that it is the duty of the neutral authorities concerned to enquire closely into its right to fly that flag, to inspect the vessel thoroughly and, in the event of torpedoes, torpedo tubes or guns being found on board, to refuse to recognise it as a merchant ship." (Foreign Relations, U. S., 1916, Supplement, p. 766.)

It is difficult to reconcile this position, if taken in regard to a merchant submarine with the attitude of the British toward other armed merchant vessels. In August

1916 the Allied Government in identic notes stated to the United States that:

"Submarine vessels should be excluded from the benefit of the rules hitherto recognized by the law of nations regarding the admission of vessels of war or merchant vessels into neutral waters, roadsteads, or ports, and their sojourn in them.

"Any belligerent submarine entering a neutral port should be detained there." (Ibid., p. 770.)

In its reply the United States Government said:

"In the opinion of the Government of the United States the Allied powers have not set forth any circumstances, nor is the Government of the United States at present aware of any circumstances, concerning the use of war or merchant submarines which would render the existing rules of international law inapplicable to them. In view of this fact and of the notice and warning of the Allied powers announced in their memoranda under acknowledgment, it is incumbent upon the Government of the United States to notify the Governments of France, Great Britain, Russia, and Japan that, so far as the treatment of either war or merchant submarines in American waters is concerned, the Government of the United States reserves its liberty of action in all respects and will treat such vessels as, in its opinion, becomes the action of a power which may be said to have taken the first steps toward establishing the principles of neutrality and which for over a century has maintained those principles in the traditional spirit and with the high sense of impartiality in which they were conceived." (Ibid, p. 771.)

Norway and other powers had indicated that they also regarded the existing principle of international law as applicable to submarines.

American opinion, January 1917.—A case showing that the United States was endeavoring to clarify its position on armed merchant vessels arose in consequence of the action of the French S. S. *Mississippi* in late 1916. This is set forth in a letter from the Secretary of State to the French Ambassador:

"WASHINGTON, *January 6, 1917.*

"MY DEAR MR. AMBASSADOR: It has been brought to this Department's attention that on November 8 last the French S. S. *Mississippi* fired on a submarine in the English Channel prior to warning or attack by the submarine. This report is virtually con-

firmed by the affidavits of the first lieutenant, the second captain, and the second lieutenant of the vessel, which is now at the port of New York. The following statement from the affidavit of the second lieutenant is pertinent:

"'My station was at the stern in command of the gun, and the captain told me to be prepared to fire at the submarine at a range of about 4,000 yards. The captain sent the second captain to the stern to instruct me to fire one shot when he gave the signal. The captain gave the signal by raising his hand and I fired one shot, and reloaded the gun and remained ready to fire another.'

"The facts before the Department indicate that this action was initiated by the *Mississippi* and therefore offensive in its nature—a circumstance which might well be regarded as placing this vessel in the class of offensively armed ships, to which this Government is firmly convinced the hospitality usually granted to merchantmen in United States ports may be denied. As, however, this is the first instance of the sort which has come to my Government's notice, and out of regard to the possibility of a mistake in this case, the vessel will be allowed to depart as usual, on your Government's assurance. I would, however, be remiss in my duty if I did not bring this case to your notice with the request that it be brought to your Government's attention, with the opinion of my Government, as herein expressed.

"In this relation I attach a copy of instructions said to have been issued by your Government to merchant sea captains, and in force in October and November last on French vessels. These instructions (if genuine) lay the armament on merchant vessels of France open at least to the inference that its purpose is for offensive attack on submarines of the enemy. I have, therefore, to ask that you be good enough to advise me at the earliest moment as to whether these instructions have been issued to the masters of French merchant vessels by your Government and are now in force. I would be grateful if you could inform me on these points as soon as possible.

"I am, etc. ROBERT LANSING."

(Foreign Relations, U. S., 1917, Supplement I, p. 544.)

As the United States entered the war within a few months there seems to have been no answer to this communication.

Prize and neutral ports.—In early days as the laws of neutrality were developing, the practice in regard to reception of prizes in neutral ports varied. Treaties em-

bodying differing principles were negotiated from time to time.

In the case of the *Appam*, a British vessel captured in 1917 off the west coast of Africa by the German cruiser *Moewe*, was brought into Hampton Roads, an American port more than 3,000 miles distant. The German contention was that the bringing in and keeping of the *Appam* in an American port was justified under article 10 of the treaty of 1799 between the United States and Prussia. (8 U. S. Stat., 172.) In the decision upon the case of the *Appam*, the Supreme Court said:

Article 19 of the treaty of 1799, using the translation adopted by the American State Department, reads as follows:

"The vessels of war, public and private, of both parties, shall carry [conduire] freely, wheresoever they please, the vessels and effects taken [pris] from their enemies, without being obliged to pay any duties, charges, or fees to officers of admiralty, of the customs, or any others; nor shall such prizes [prises] be arrested, searched or put under legal process, when they come to and enter the ports of the other party, but may freely be carried [conduites] out again at any time by their captors [le vaisseau preneur] to the places expressed in their commissions, which the commanding officer of such vessel [le dit vaisseau] shall be obliged to show. (But conformably to the treaties existing between the United States and Great Britain, no vessel [vaisseau] that shall have made a prize [prise] upon British subjects shall have a right to shelter in the ports of the United States, but if [il est] forced therein by tempests, or any other danger, or accident of the sea, they [il sera] shall be obliged to depart as soon as possible.)" The provision concerning the treaties between the United States and Great Britain is no longer in force, having been omitted by the treaty of 1828 [8 Stat. L. 378]. See Compilation of Treaties in Force, 1904, pages 641 and 646.

We think an analysis of this article makes manifest that the permission granted is to vessels of war and their prizes, which are not to be arrested, searched, or put under legal process when they come into the ports of the high contracting parties, to the end that they may be freely carried out by their captors to the places expressed in their commissions, which the commanding officer is obliged to show. When the *Appam* came into the American harbor she was not in charge of a vessel of war of the German Empire. She was a merchant vessel, captured on the high seas

and sent into the American port with the intention of being kept there indefinitely, and without any means of leaving that port for another, as contemplated in the treaty, and required to be shown in the commission of the vessel bringing in the prize. Certainly such use of a neutral port is very far from that contemplated by a treaty which made provision only for temporary asylum for certain purposes, and can not be held to imply an intention to make of an American port a harbor of refuge for captured prizes of a belligerent Government. We can not avoid the conclusion that in thus making use of an American port there was a clear breach of the neutral rights of this Government, as recognized under principles of international law governing the obligations of neutrals, and that such use of one of our ports was in no wise sanctioned by the treaty of 1799. (242 U. S. Supreme Court Reports, 124; see also 1922 Naval War College, International Law Decisions, p. 160.)

In general during the World War neutral states prohibited the entrance of prize to their territorial waters except in case of distress, shortage of fuel or coal.

XIII Hague Convention, 1907, provided in regard to the entrance of prize to neutral waters, and the American attitude toward these provisions was stated in the case of the *Appam* cited above.

"This policy of the American Government was emphasized in its attitude at The Hague Conference of 1907. Article 21 of The Hague treaty provides:

"'A prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions.

"'It must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral power must order it to leave at once; should it fail to obey, the neutral power must employ the means at its disposal to release it with its officers and crew and to intern the prize crew.'

"Article 22 provides:

"'A neutral power must, similarly, release a prize brought into one of its ports under circumstances other than those referred to in article 21.'

"To these articles, adherence was given by Belgium, France, Austria-Hungary, Germany, the United States, and a number of other nations. They were not ratified by the British Government. This Government refused to adhere to article 23, which provides:

"'A neutral power may allow prizes to enter its ports and roadsteads, whether under convoy or not, when they are brought there to be sequestrated pending the decision of a prize court.'" (1922 Naval War College, International Law Decisions, p. 159.)

Brazil in World War, 1914–18.—By decree no. 11,037 of August 4, 1914, Brazil announced detailed rules of neutrality. The rules were reaffirmed as other states later joined in war. In earlier wars, Brazilian rules have also been very comprehensive. During the World War, Brazil from time to time modified the regulations.

Article 20, which was issued on August 4, 1914, read as follows:

"The captures made by a belligerent may only be brought to a Brazilian port in case of unseaworthiness, stress of weather, lack of fuel or food provisions, and also under the conditions provided hereinbelow in Article 21st.

"The prize must depart as soon as the cause or causes of her arrival cease. Failing that departure, the Brazilian authority will notify the commander of the prize to leave at once, and, if not obeyed, will take the necessary measures to have the prize released with her officers and crew, and to intern the prize crew placed on board by the captor.

"Any prize entering a Brazilian port or harbor, except under the aforesaid four conditions, will be likewise released." (1916 Naval War College, International Law Topics, p. 13.)

By degree no. 11,093 of August 24, 1914, a fifth condition of entrance with prize was published as follows:

"In any one of the hypotheses of the Articles 20 and 21 the Brazilian Government reserves to itself the right to demand the disembarking from on board the prizes of the merchandise destined to Brazil." (1917 Naval War College, International Law Documents, p. 62.)

Other changes in Brazilian neutrality rules were also announced.

League of Nations and communications.—Under article 23 of the Covenant of the League of Nations, the members of the League of Nations, subject to the provisions of international conventions, agree that they:

"(e) will make provisions to secure and maintain freedom of communications and of transit and equitable treatment, for the commerce of all members of the League."

To carry out this agreement and following certain preliminary investigations, the first General Conference on Communications and Transit was held at Barcelona on March 10 to April 20, 1921.

The Advisory and Technical Committee for Communications and Transit of the League also worked upon the same subject. The object of the conference was to devise measures to remove interference with international transport and to take steps toward "rendering international friction less frequent and diminishing the risk of war." The conventions agreed upon at the Barcelona Conference were to apply in time of war "as far as might be compatible." The conference also recognized the possibility of special regulations depending upon regional or geographical circumstances.

Transport in transit.—The question of transport in transit had been defined as "transport which crosses a state, its points of departure and destination being outside that state." In the explanation of this term, the report says:

"Transport of this kind is specially in need of international guarantees. In the case of the transport of exports and imports, a State which obstructs or prevents free movement of such transport may indirectly cause serious prejudice to the economic reconstruction of the world. In this way it injures every State, but it directly injures only, either those exporting States the transport of whose goods it prevents or obstructs in the course of importation, or those importing States which may, for instance, be in need of raw materials, which the obstructing State possesses, and the export of which it prohibits. As regards transport in transit, on the other hand, any interruption or obstruction injures third parties, both the States which export and those which import the products, the passage of which has been prevented. Such an interruption of traffic inevitably causes reprisals and counter-effects, the results of which cannot be limited.

"The International Convention of Barcelona on Freedom of Transit is, therefore, designed to prevent interruption or obstruction of this kind. With this object it provides—making due al-

lowance, of course, for legitimate restrictions as regards police, national security, transport in war-time, etc., and also for the need of adapting its measures to the existing legal position, and to the local or regional conditions in various parts of the world—for complete freedom of transit and complete equality of transit conditions." (League of Nations. A45.1921.VIII, p. 3.)

The provisions in regard to transport in transit were in principle to apply to traffic overland or by water.

Transit through the Netherlands, 1918.—Problems arose during the World War in regard to the transit of goods and persons across Limburg from Germany into Belgium. The American Minister reported from The Hague, April 23, 1918, that:

"Germany has within the last few days demanded of Holland:

"(1) Removal of vexations customs examinations at the frontiers;

"(2) Passage of civil goods on the Limburg railways, from München-Gladbach via Roermond to Antwerp;

"(3) That the Rhine convention shall be understood as Germany understands it, namely, that everything goes through in war, as in peace;

"(4) Unrestricted and uncontrolled transit of sand and gravel; and—

"(5) That troops and munitions shall be allowed to pass through Limburg.

"The best obtainable information is to the effect that demand number 5 has not actually been presented to the Dutch Government, but that a statement regarding it was handed in by German Legation through 'mistake' with the four other demands. The Austrian Minister, I learn from what I consider to be perfectly good authority, was informed by his German colleague of the presentation of the first four demands, and he learned about the fifth demand only through the British Chargé d'Affairs, the Dutch Minister of Foreign Affairs having told Sir Walter Townley of it and he having told a go-between. Loudon, Treub and, so far as I can learn, the members of the Government as a rule, and the Dutch Army pretend publicly to believe that these German demands are nothing but a bluff and that they are not in the least worried about them. Bluff or not, they produce a situation that Loudon states privately he considers serious.

"German policy is now controlled entirely from General Headquarters. Nobody doubts that they would order Holland entered

for their own purposes, at any time, if they thought they had anything to get thereby. The demand for the passage of troops and munitions through Limburg, if it should be made, would not differ in its effects from a demand for the use of the Scheldt, or a demand for the use of any other part of Dutch territory. The Dutch would resent it and though I find that Entente military circles here believe or profess to believe that the Dutch Army would fight, there are other well-informed circles that think that the Dutch would not go beyond a breaking off of diplomatic relations with the Central Powers and the necessary formal protests." (Foreign Relations, U. S., 1918, Supplement, p. 1797.)

Navigable waterways.—The Treaty of Versailles, June 28, 1919, in effect January 10, 1920, provided for certain navigable waterways in article 331:

"The following rivers are declared international:

"the Elbe (Labe) from its confluence with the Vltava (Moldau), and the Vltava (Moldau) from Prague:

"the Oder (Odra) from its confluence with the Oppa;

"the Niemen (Russstrom-Memel-Niemen) from Grodno;

"the Danube from Ulm;

"and all navigable parts of these river systems which naturally provide more than one State with access to the sea, with or without transshipment from one vessel to another; together with lateral canals and channels constructed either to duplicate or to improve naturally navigable sections of the specified river systems, or to connect two naturally navigable sections of the same river." (1919 Naval War College, International Law Documents, p. 160.)

At the Barcelona Conference in 1921 further suggestions were made which were embodied in a statute which defined rivers of international concern:

"Article 1. In the application of the Statute, the following are declared to be navigable waterways of international concern:

"1. All parts which are naturally navigable to and from the sea of a waterway which in its course, naturally navigable to and from the sea, separates or traverses different States, and also any part of any other waterway naturally navigable to and from the sea, which connects with the sea a waterway naturally navigable which separates or traverses different States." (League of Nations Documents, C.479.M.327.1921.VIII, p. 17.)

Aerial Navigation.—The Treaty of Versailles, in providing for aerial navigation, in article 314 made specific provision in regard to Germany as follows:

"The aircraft of the Allied and Associated Powers shall, while in transit to any foreign country whatever, enjoy the right of flying over the territory and territorial waters of Germany without landing, subject always to any regulations which may be made by Germany, and which shall be applicable equally to the aircraft of Germany and to those of the Allied and Associated countries."

These conditions were regarded as imposed obligations to remain in force till January 1, 1923, unless Germany was earlier admitted to adhere to the Aerial Navigation Convention or had become a member of the League of Nations.

Aircraft over the Straits.—A convention on the Régime of the Straits signed at Lausanne, July 24, 1923, provides for freedom of transit and of navigation by sea and by air of the Strait of Dardanelles, the Sea of Marmora and the Bosphorus. Turkey ratified this convention on March 31, 1924, and British, Italian, Japanese, and French ratifications were deposited later in 1924.

In the annex stating the rules for passage of vessels and aircraft, there are provisions regulating the details of passage:

"1. (b). *In Time of War, Turkey being Neutral.*

"Complete freedom of navigation and passage by day and night under the same conditions as above. The duties and rights of Turkey as a neutral Power cannot authorize her to take any measures liable to interfere with navigation through the Straits, the waters of which, and the air above which, must remain entirely free in time of war, Turkey being neutral just as in time of peace." * * *

"2. (b). *In Time of War, Turkey being Neutral.*

"Complete freedom of passage by day and by night under any flag, without any formalities, or tax, or charge whatever, under the same limitations as in paragraph 2 (a).

"However, these limitations will not be applicable to any belligerent Power to the prejudice of its belligerent rights in the Black Sea.

"The rights and duties of Turkey as a neutral Power cannot authorise her to take any measures liable to interfere with navigation through the Straits, the waters of which, and the air above which, must remain entirely free in time of war, Turkey being neutral, just as in time of peace.

"Warships and military aircraft of belligerents will be forbidden to make any capture, to exercise the right of visit and search, or to carry out any other hostile act in the Straits.

"As regards revictualling and carrying out repairs, war vessels will be subject to the terms of the Thirteenth Hague Convention of 1907, dealing with maritime neutrality.

"Military aircraft will receive in the Straits similar treatment to that accorded under the Thirteenth Hague Convention of 1907 to warships, pending the conclusion of an international Convention establishing the rules of neutrality for aircraft." (2 Hudson, International Legislation, pp. 1030, 1032.)

Panama Canal.—The proclamation of the United States, November 13, 1914, in regard to the Panama Canal contained rules in regard to the Canal:[1]

"RULE 15. Aircraft of a belligerent power, public or private, are forbidden to descend or arise within the jurisdiction of the United States at the Canal Zone, or to pass through the air spaces above the lands and waters within said jurisdiction.

"RULE 16. For the purpose of these rules the Canal Zone includes the cities of Panama and Colon and the harbors adjacent to the said cities." (1915 Naval War College, International Law Topics, p. 11; 38 U. S. Stat., p. 2039.)

After the United States became a belligerent power it was necessary to amend these rules and on May 23, 1917, it was proclaimed that:

"RULE 13. Aircraft, public or private, of a belligerent, other than the United States, are forbidden to descend or arise within the jurisdiction of the United States at the Canal Zone, or to pass through the air spaces above the lands and waters within said jurisdiction.

"RULE 14. For the purpose of these rules the Canal Zone includes the cities of Panama and Colon and the harbors adjacent to the said cities." (Foreign Relations, U. S., 1917, Supplement II, p. 1267.)

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[1] For canals in wartime, see 1930 Naval War College, International Law Situations, pp. 115–134.

Suez Canal, 1915.—A circular of May 1915 gave the Turkish point of view in regard to the status of the Suez Canal:

"Considering that the British Government not only has failed to observe, in reference to the powers, the engagements to which it is bound by the convention of 1888, stipulating that no war vessel can remain in the Suez Canal, but also it is now fortifying the canal, while, on the other hand, the French Government, in view of hostile action against the Ottoman Empire, has landed troops in Egypt, the Imperial Ottoman Government, by reason of these facts, considers itself under the imperious necessity of taking military measures for the protection of the imperial territory, of which Egypt forms a part, and of extending hostilities to the Suez Canal. If such measures cause any injury whatever to neutral vessels, it is thus evident that the responsibility will be upon the French and British Governments." (1917 Naval War College, International Law Documents, p. 221.)

Marginal air zone.—At the meeting of the Commission of Jurists at The Hague in 1923, the Italian delegation proposed that along the seacoast there should be an air belt under national jurisdiction extending seaward ten miles. This was not acceptable to the commission. It was argued that such a provision would give rise to confusion, that jurisdiction in the air should be appurtenant to the subjacent jurisdiction, that it would enlarge the area of neutral obligation without "compensating advantages", and would make it more difficult for aircraft to determine with precision their location and to act accordingly. It was also pointed out that if the ten-mile air zone was adopted by a neutral, the belligerent aircraft might alight on the sea and pass at once out of the neutral jurisdiction. (1924 Naval War College, International Law Documents, p. 152.) It has also been pointed out that under such a rule a vessel of war, surface or submarine, might on passing within ten miles of a neutral shore be exempt from aerial attack, and it should be pointed out that the aircraft would not be exempt from attack by anti-aircraft guns of the enemy vessels.

A statement of the Italian delegation nevertheless maintained that:

"3. From the point of view both of belligerent and of neutral States, there are reasons of the highest juridical and technical importance which make it indispensable to allow each State the power of including in its jurisdiction the atmospheric space to a distance of 10 miles from its coast.

"4. The difficulties resulting from the difference between the width of the marginal air-belt and the width of national territorial waters would not seem to be so serious as to render the Italian proposal unacceptable in practice.

"5. In any case, there is no juridical obstacle to the fixing of the same width of space for the marginal air-belt as for territorial waters, the Italian Delegation being of opinion that international law, as generally recognised, contains no rule prohibiting a State from extending its territorial waters to a distance of 10 sea-miles from its coasts." (Ibid, p. 153.)

It is evident that while aerial navigation may and does call for further regulations, such regulations should be based upon a comprehensive understanding of all their bearings upon accepted laws relating to other jurisdiction. Action by a single state which would attempt to modify the laws of war or neutrality in time of war leads to confusion and may lead to an extension of the war to other states.

Brazil and neutrality, 1933.—In the war between Bolivia and Paraguay, Brazil declared neutrality on May 23, 1933. In introducing the declaration there was a somewhat long explanatory statement in which it was said:

"Considering, that not being a member of the League of Nations, Brazil is not bound by the prescriptions of the Pact, and that, having to affirm its neutrality, it is guided by international law, written and customary, and by the elevated spirit of justice and morality which civilization has inculcated in the conscience of cultured peoples

"Considering, that the General Rules of Neutrality adopted by Brazil during the World War, prior to having been drawn into it, and which were established by decree No. 11,037 of August 4, 1914, and completed or modified by subsequent acts, do not fully satisfy the requirements of the present moment, because, at the time of their publication war in another continent was contem-

plated, the acts of belligerency on the sea being those which would most preoccupy the country, whereas now the strife is between neighboring and mediterranean nations, problems of river navigation have arisen, and while the international spirit has greatly increased during the past years ideas regarding war have changed considerably;" * * *

"Considering, however, that in order to settle the incidents which may arise and to govern the actions of Brazil and the Brazilians, there is the general idea of neutrality, which consists in the neutral State abstaining from taking part directly or indirectly in the action of the belligerents; in not disturbing in any way war operations occurring outside of its territory; in not allowing, within it, acts of hostility; and in having assured the freedom of its peaceful commerce, the expression of its sovereignty, which war abroad cannot reasonably limit; deducing from this last proposition that only the normal purpose of the merchandise and its destiny, can influence its classification as hostile or innocent;".

While the rules in regard to neutrality issued under the declaration contained the ordinary provisions in regard to the use of Brazilian waters by vessels of war, there were also such provisions as the following:

"ARTICLE 5. It is forbidden to the belligerents to make on the land, river, or maritime territory of the United States of Brazil, a base of war operations or to practice acts which may constitute a violation of Brazilian neutrality."

"ARTICLE 21. Belligerent airplanes may not fly over the territory or jurisdictional waters of Brazil without previous authorization. Those not authorized that land on Brazilian territory or waters will be detained.

"Military airplanes will not be given authorization to fly over Brazilian territory."

Neutralization of maritime areas.—Proposals were made early in the World War to close considerable areas of the Atlantic Ocean to belligerents or to apply the ordinary rules of neutrality according to a geographical interpretation. It was suggested that a neutral zone in the Atlantic from the American coast to the meridian of Cape Verde be established to prevent interference with American commerce. This proposition was considered by the Chilean Government and the following reply was made:

"This Government has already been seeking means to diminish the disturbances which the activities of the belligerents off the American coasts have been causing to the maritime commerce of the nations of this continent, and had, in the first place, considered the idea of fixing a neutral zone within which said commerce would not be disturbed. Nevertheless, a careful study of the question leads me to think that a measure of this nature will not be accepted by the Government of Great Britain, and that, even though it were accepted by that Government, it would not be productive of any appreciable results in the sense desired. As a matter of fact, it seems doubtful that the British Government would accept a measure which in reality would be of much greater profit to Germany, whose merchant marine is now totally paralyzed, than to England which still maintains a maritime movement of some vitality in American waters. On the other hand, the efficacy of such a measure would have very little weight on the commercial interchange between Europe and America, because the danger would continue beyond the neutral zone, that is to say, in European waters wherein the situation of belligerent ships would remain as it is to-day. Consequently, the advantages of the measure would be restricted to the interchange between American countries. Finally, the enormous extent of the neutral zone would render the surveillance required by our neutral duties still much more difficult and costly than it is today, unless the measure were to be a merely illusory one." (Foreign Relations, U.S., 1914, Supplement, p. 436.)

There was also some discussion as to the joint action of the American states as to a proposition to the belligerents that "sections of the Southern Atlantic and Pacific should be closed to naval warfare and that the belligerents should come to some agreement with the Union as to the protection of neutral shipping."

The Pan American Union on December 8, 1914, passed a resolution favoring a commission to study "the problems presented by the present European War" particularly as regards neutral relations.

The Peruvian Minister at Washington in a communication of December 12, 1914, mentioned the proposal of

"an American continental agreement with the object of imposing on belligerents for the first time respect for the inviolability of the American highways of commerce, as a new principle of international law arising out of the needs of a situation created by

the devastating clash of such formidable elements of force and destruction.

"The fundamental object of the agreement which the Peruvian Government is seeking once clearly determined, there can enter into consideration no possibility that such an agreement may prove injurious to this or that belligerent and meet with its more or less open opposition. Since all that we seek is to prevent violent aggressions from being carried beyond their proper theatre to the enormous distance at which America lies, and since in support thereof a pacific right of self-preservation is invoked, which is obviously more worthy of respect than the right of destruction and annihilation which each belligerent claims against his enemy, there is no occasion to ask which of the combatants will accept it. Let us proclaim, maintain, and enforce the right of the neutral nations, consolidated in the form of a continental agreement, to keep hostilities away from geographical areas not involved in the natural influences and effects of the war, where prevails a normal, valuable, and peaceful trade, which is experiencing disastrous effects to the extent of crisis and ruin, daily aggravated by the continuance of such a state of things. The territorial waters fiction and, to a certain degree, the very right of asylum for ships of the belligerent countries in neutral harbors, have as their true foundation the safeguarding of moral and physical interests whose defense could not be subordinated to the right of aggression, if it may be so called, of one belligerent against the other. Respect of territorial waters and of vessels accorded asylum was enforced without ascertaining who might complain against those principles being put in practice; it was enough to know that they were the result of justified necessity, and the principles have grown to the estate of a right and of a right that is compulsory." (Ibid., p. 445.)

In some of the South American states such propositions as related to neutralization met with little response and the American Legation in Brazil reported on December 11, 1914:

"The members of the Foreign Office are particularly jubilant over what is considered a decided success for their initiative. In business circles and among those not directly connected with the Government it must be confessed that there is no special enthusiasm on this subject as it seems to be the general opinion that little of practical importance can be accomplished by the Pan American Union in the premises. Now that the German war vessels in this part of the World have been destroyed, it seems to

be the impression among practical persons that there is at present no further need for the good offices of the union." (Ibid., p. 452.)

Attitude of United States toward Switzerland.—The neutralization of Switzerland had been generally respected during the World War, and Switzerland had shown a disposition to maintain its neutrality by force when necessary. While the United States was not a party to the neutralization treaties in regard to Switzerland, it made known its attitude.

"WASHINGTON, *November 30, 1917, 5 p.m.*

"1171. You are instructed to formally present the following communication to the Minister of Foreign Affairs:

"'In view of the presence of American forces in Europe engaged in the prosecution of the war against the Imperial German Government, the Government of the United States deems it appropriate to announce for the assurance of the Swiss Confederation and in harmony with the attitude of the co-belligerents of the United States in Europe, that the United States will not fail to observe the principle of neutrality applicable to Switzerland and the inviolability of its territory, so long as the neutrality of Switzerland is maintained by the Confederation and respected by the enemy.

Lansing.'"

(Foreign Relations, U. S., 1917, Supplement 2, Vol. I, p. 758.)

Limiting areas of hostilities.—Early in August 1914 China raised the question as to whether European belligerents might consent "not to engage in hostilities either in Chinese territory and marginal waters, or in adjacent leased territories." Propositions "concerning the possible neutralization of the Pacific Ocean" were advanced. There was in early August a general desire for the maintenance of the *status quo* in the Far East. On August 13 the German Government said:

"1. Germany does not seek war with Japan.

"2. If Japan, on account of the treaty with England, asks that Germany do nothing against English colonies, warships, or commerce in East, Germany will assent in return for corresponding promise from England.

"3. England and Germany to reciprocally agree that either all warships of both in East leave eastern waters or remain inactive as against the other, if remaining there.

"4. Japan, England, and Germany to agree that none of these three shall attack warships, colonies, territory, or commerce of any of the others in the East.

"5. The East to mean all lands and seas between parallels London 90 east and all Pacific to Cape Horn.

"Notify German Ambassador in Tokyo.

"If this zone is too large, smaller limits will be accepted." (Foreign Relations, U. S., 1914, Supplement, p. 169.)

Japan on August 15 proposed to Germany:

"(1) To withdraw immediately from the Japanese and Chinese waters German men-of-war and armed vessels of all kinds and to disarm at once those which cannot be so withdrawn.

"(2) To deliver on a date not later than September 15, 1914, to the Imperial Japanese authorities without condition or compensation the entire leased territory of Kiaochow, with a view to eventual restoration of the same to China.

"The Imperial Japanese Government announce at the same time that in the event of their not receiving by noon, August 23, 1914, the answer of the Imperial German Government signifying an unconditional acceptance of the above advice offered by the Imperial Japanese Government, they will be compelled to take such action as they may deem necessary to meet the situation." (Ibid, p. 170.)

On August 18 the British chargé d'affaires in Washington communicated to the Secretary of State the following memorandum,

"The Governments of Great Britain and Japan having been in communication with each other are of opinion that it is necessary for each to take action to protect the general interests in the Far East contemplated by the Anglo-Japanese Alliance, keeping specially in view the independence and integrity of China as provided for in that agreement.

"It is understood that the action of Japan will not extend to the Pacific Ocean beyond the China Seas, except in so far as it may be necessary to protect Japanese shipping lines in the Pacific, nor beyond Asiatic waters westward of the China Seas, nor to any foreign territory except territory in German occupation on the continent of eastern Asia." (Ibid., p. 171.)

On August 23 the Japanese informed the United States that as Germany had failed to make answer to the Japanese note of August 15, a state of war existed between Japan and Germany from noon August 23, 1914.

In spite of discussion of limiting the area of hostilities, no agreement could be reached.

Limits of belligerent rights.—When Germany issued on February 4, 1915, the war zone proclamation stating that neutral vessels exposed themselves to danger in the waters surrounding Great Britain and Ireland and in the English Channel, the United States sent a note of protest. In this note of February 10, 1915, it was said:

"It is of course not necessary to remind the German Government that the sole right of a belligerent in dealing with neutral vessels on the high seas is limited to visit and search, unless a blockade is proclaimed and effectively maintained, which this Government does not understand to be proposed in this case. To declare or exercise a right to attack and destroy any vessel entering a prescribed area of the high seas without first certainly determining its belligerent nationality and the contraband character of its cargo would be an act so unprecedented in naval warfare that this Government is reluctant to believe that the Imperial Government of Germany in this case contemplates it as possible. The suspicion that enemy ships are using neutral flags improperly can create no just presumption that all ships traversing a prescribed area are subject to the same suspicion. It is to determine exactly such questions that this Government understands the right of visit and search to have been recognized." (Foreign Relations, U. S., 1915, Supplement, p. 98.)

Foreign interpretation of national duties.—Belligerent rights and duties as well as neutral rights and duties rest upon international law. Belligerents have often attempted to extend their rights and neutral duties even by suggesting that neutrals take action in regard to opposing belligerents which might be beyond neutral obligations.

On January 30, 1917, the Norwegian Government by a Royal Ordinance prescribed that after February 6, 1917:

"Submarines, equipped for use in war, and belonging to a belligerent power, may not be navigated or remain in Norwegian territorial waters. Breach of this prohibition will render such vessels liable to attack by armed force without previous warning.

"This prohibition shall not prevent submarines from seeking Norwegian territorial waters on account of stress of weather, or

damage, or in order to save human life; when within territorial waters in such cases the vessel shall be kept at the surface and shall fly her national flag and also the international signal indicating the reason of her presence. As soon as the reasons justifying the arrival of the vessel are no longer present, she shall depart from territorial waters." (1917 Naval War College, International Law Documents, p. 195.)

The British and American Governments had raised question as to the measures taken to enforce this ordinance. To the Government of the United States in reply to a suggestion of a few days previous that Norwegian waters be mined against German submarines in addition to the patrolling of the waters, the Minister of Foreign Affairs on August 20, 1918, said:

"With reference to the statement of the American Government that the Norwegian Government has not insisted on impartial compliance with the Norwegian resolution in question, and that the measures hitherto adopted have only been nominal, and in view of the recommendation of the American Government to the Norwegian Government to take such new and effective measures as will effectually prevent the passage of German submarines through Norwegian territorial waters, the Norwegian Government desires to point [out] the following:

"The duties imposed in time of war by international law on a neutral state in respect of its territorial waters consist, partly in the obligation that it shall prevent by all the means at its disposal any of the belligerents utilizing them for operations of war or as a base there for, and partly in the obligation that it shall enforce upon all the belligerents equally the observance of the regulations it issues. No matter what may flow from these obligations, none of the belligerents is justified by international law in demanding that special measures be taken by the neutral state in its own territorial waters. The Norwegian Government is convinced that it has unquestionably fulfilled its obligations in respect of both the above-mentioned points. Just as its efforts since the commencement of the war have been directed towards the maintenance of an inviolable neutrality, so it is still its firm intention to maintain it in the future and to avoid any step which may be considered as a deviation from this attitude.

"The above-mentioned resolution of January 30, 1917, which concerns the passage through and sojourn in territorial waters of submarines, is solely based on consideration of Norwegian interest and is obviously not intended to facilitate the war meas-

ures of one or other of the belligerents. Neither does it enjoin upon Norway any other obligation under international law than that of enforcing the resolution equally upon all parties concerned which the Norwegian Government, as already mentioned, is convinced that it has done. It cannot concede the right to any state to demand special measures in order to insure its observance.

"It will, however, be calculated to call forth the serious consideration of the Norwegian Government if it be established that German submarines have utilized Norwegian territorial waters as a passage in violation of the said resolution. The Norwegian Government must request the American Government for more detailed information in regard to the cases which the latter has in mind relative to the appearance of German submarines in Norwegian territorial waters. The Norwegian Government would appreciate as complete information as possible, such as fuller details as to the time and place and the certainty that the submarines in question were German in each case, besides information as to the state of the weather.

"When the Norwegian Government receives the information referred to from the American Government, it will immediately take into consideration [the measures] occasioned thereby in the interests of Norway and the Government might then feel called upon to take measures for sharper protection of Norwegian territorial waters. But it must definitely insist that it is its incontestable right by international law to determine for itself what measures should be taken in this respect." (Foreign Relations, U. S., 1918, Supplement I, vol. II, p. 1779.)

Position of state D.—While the geographical contiguity of states X, Y, and D might give rise to certain doubts as to the neutral obligations of state D, this contiguity would not affect the rights of X and Y under a declaration of war.

The vessels of war of X or of Y might visit and search the merchant vessels of state D or of any neutral state. If a vessel of war of state Y should capture a merchant vessel of D or of a neutral state, the vessel of war might find difficulty in bringing it to a prize court and other problems might arise but it is possible that these might not arise and it would be for states Y and D to adjust such difficulties after they arise rather than for state D to presume in advance to declare the rights of Y. It is clear that state D could not legally determine the bellig-

erent rights of state X nor could state D lawfully refuse to recognize these rights. The rights in regard to contraband, continuous voyage, unneutral service, and other belligerent rights could not be denied to state X by state D.

As a state not a party to the war, state D would not be at liberty to permit indefinite sojourn in its ports of vessels of war or to tolerate any act within its jurisdiction which would constitute a nonfulfillment of neutral duties.

Manifestly from its geographical position, state Y may be under certain disadvantages when at war with a maritime state, but the laws of war and of neutrality are not conditioned upon premises of a geographical nature though one or the other of the belligerents may be more strategically at an advantage on account of its location.

SOLUTION

(*a*) State A may lawfully in its proclamation of neutrality exclude all vessels of war and vessels assimilated thereto. This would apply to armed merchant vessels, but ordinarily not to unarmed merchant vessels whether or not decks had been strengthened.

(*b*) State B may lawfully refuse to admit vessels of war of X and Y with prize except on account of unseaworthiness, stress of weather, or lack of fuel or supplies.

(*c*) State C may lawfully refuse to permit aircraft of Y to fly over its territory to a vessel of Y which is at sea.

(*d*) State D may not lawfully refuse to grant to X and Y rights which might flow from a declaration of war or refuse to accept any neutral obligations so far as aerial or maritime acts are concerned though the geographical location of state D might make special regulations justifiable.

APPENDIX I

[Public Resolution—No. 67—74th Congress]

[S. J. Res. 173]

JOINT RESOLUTION

Providing for the prohibition of the export of arms, ammunition, and implements of war to belligerent countries; the prohibition of the transportation of arms, ammunition, and implements of war by vessels of the United States for the use of belligerent states; for the registration and licensing of persons engaged in the business of manufacturing exporting, or importing arms, ammunition, or implements of war; and restricting travel by American citizens on belligerent ships during war.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That upon the outbreak or during the progress of war between, or among, two or more foreign states, the President shall proclaim such fact, and it shall thereafter be unlawful to export arms, ammunition, or implements of war from any place in the United States, or possessions of the United States, to any port of such belligerent states, or to any neutral port for transshipment to, or for the use of, a belligerent country.

The President, by proclamation, shall definitely enumerate the arms, ammunition, or implements of war, the export of which is prohibited by this Act.

The President may, from time to time, by proclamation, extend such embargo upon the export of arms, ammunition, or implements of war to other states as and when they may become involved in such war.

Whoever, in violation of any of the provisions of this section shall export, or attempt to export, or cause to be exported, arms, ammunition, or implements of war from the United States, or any of its possessions, shall be fined not more than $10,000 or imprisoned not more than five years, or both, and the property, vessel, or vehicle containing the same shall be subject to the provisions of sections 1 to 8, inclusive, title 6, chapter 30, of the Act

approved June 15, 1917 (40 Stat. 223–225; U. S. C., title 22, secs. 238–245).

In the case of the forfeiture of any arms, ammunition, or implements of war by reason of a violation of this Act, no public or private sale shall be required; but such arms, ammunition, or implements of war shall be delivered to the Secretary of War for such use or disposal thereof as shall be approved by the President of the United States.

When in the judgment of the President the conditions which have caused him to issue his proclamation have ceased to exist he shall revoke the same and the provisions hereof shall thereupon cease to apply.

Except with respect to prosecutions committed or forfeitures incurred prior to March 1, 1936, this section and all proclamations issued thereunder shall not be effective after February 29, 1936.

SEC. 2. That for the purposes of this Act—

(a) The term "Board" means the National Munitions Control Board which is hereby established to carry out the provisions of this Act. The Board shall consist of the Secretary of State, who shall be chairman and executive officer of the Board; the Secretary of the Treasury; the Secretary of War; the Secretary of the Navy; and the Secretary of Commerce. Except as otherwise provided in this Act, or by other law, the administration of this Act is vested in the Department of State;

(b) The term "United States" when used in a geographical sense, includes the several States and Territories, the insular possessions of the United States (including the Philippine Islands), the Canal Zone, and the District of Columbia;

(c) The term "person" includes a partnership, company, association, or corporation, as well as a natural person.

Within ninety days after the effective date of this Act, or upon first engaging in business, every person who engages in the business of manufacturing, exporting, or importing any of the arms, ammunition, and implements of war referred to in this Act, whether as an exporter, importer, manufacturer, or dealer, shall register with the Secretary of State his name, or business name, principal place of business, and places of business in the United States, and a list of the arms, ammunition, and implements of war which he manufactures, imports, or exports.

Every person required to register under this section shall notify the Secretary of State of any change in the arms, ammunition, and implements of war which he exports, imports, or manufactures; and upon such notification the Secretary of State shall issue to such person an amended certificate of registration, free of charge, which shall remain valid until the date of expiration of the original certificate. Every person required to register under the provisions of this section shall pay a registration fee of $500. and upon receipt of such fee the Secretary of State shall issue a registration certificate valid for five years, which shall be renewable for further periods of five years upon the payment of each renewal of a fee of $500.

It shall be unlawful for any person to export, or attempt to export, from the United States any of the arms, ammunition, or implements of war referred to in this Act to any other country or to import, or attempt to import, to the United States from any other country any of the arms, ammunition, or implements of war referred to in this Act without first having obtained a license therefor.

All persons required to register under this section shall maintain, subject to the inspection of the Board, such permanent records of manufacture for export, importation, and exportation of arms, ammunition, and implements of war as the Board shall prescribe.

Licenses shall be issued to persons who have registered as provided for, except in cases of export or import licenses where exportation of arms, ammunition, or implements of war would be in violation of this Act or any other law of the United States, or of a treaty to which the United States is a party, in which cases such licenses shall not be issued.

The Board shall be called by the Chairman and shall hold at least one meeting a year.

No purchase of arms, ammunition, and implements of war shall be made on behalf of the United States by any officer, executive department, or independent establishment of the Government from any person who shall have failed to register under the provisions of this Act.

The Board shall make an annual report to Congress, copies of which shall be distributed as are other reports transmitted to Congress. Such report shall contain such information and data collected by the Board as may be considered of value in the determination of questions

connected with the control of trade in arms, ammunition, and implements of war. It shall include a list of all persons required to register under the provisions of this Act, and full information concerning the licenses issued hereunder.

The Secretary of State shall promulgate such rules and regulations with regard to the enforcement of this section as he may deem necessary to carry out its provisions.

The President is hereby authorized to proclaim upon recommendation of the Board from time to time a list of articles which shall be considered arms, ammunition, and implements of war for the purposes of this section.

This section shall take effect on the ninetieth day after the date of its enactment.

SEC. 3. Whenever the President shall issue the proclamation provided for in section 1 of this Act, thereafter it shall be unlawful for any American vessel to carry any arms, ammunition, or implements of war to any port of the belligerent countries named in such proclamation as being at war, or to any neutral port for transshipment to, or for the use of, a belligerent country.

Whoever, in violation of the provisions of this section, shall take, attempt to take, or shall authorize, hire, or solicit another to take, any such vessel carrying such cargo out of port or from the jurisdiction of the United States shall be fined not more than $10,000 or imprisoned not more than five years, or both; and, in addition, such vessel, her tackle, apparel, furniture, equipment, and the arms, ammunition, and implements of war on board shall be forfeited to the United States.

When the President finds the conditions which have caused him to issue his proclamation have ceased to exist, he shall revoke his proclamation, and the provisions of this section shall thereupon cease to apply.

SEC. 4. Whenever, during any war in which the United States is neutral, the President, or any person thereunto authorized by him, shall have cause to believe that any vessel, domestic or foreign, whether requiring clearance or not, is about to carry out of a port of the United States, or its possession, men or fuel, arms, ammunition, implements of war, or other supplies to any warship, tender, or supply ship of a foreign belligerent nation, but the evidence is not deemed sufficient to justify forbidding the departure of the vessel as provided for by section 1, title V, chapter 30, of the Act approved June 15, 1917

(40 Stat. 221; U. S. C., title 18, sec. 31), and if, in the President's judgment, such action will serve to maintain peace between the United States and foreign nations, or to protect the commercial interests of the United States and its citizens, or to promote the security of the United States, he shall have the power and it shall be his duty to require the owner, master, or person in command thereof, before departing from a port of the United States, or any of its possessions, for a foreign port, to give a bond to the United States, with sufficient sureties, in such amount as he shall deem proper, conditioned that the vessel will not deliver the men, or the cargo, or any part thereof, to any warship, tender, or supply ship of a belligerent nation; and, if the President, or any person thereunto authorized by him, shall find that a vessel, domestic or foreign, in a port of the United States, or one of its possessions, has previously cleared from such port during such war and delivered its cargo or any part thereof to a warship, tender, or supply ship of a belligerent nation, he may prohibit the departure of such vessel during the duration of the war.

SEC. 5. Whenever, during any war in which the United States is neutral, the President shall find that special restrictions placed on the use of the ports and territorial waters of the United States, or of its possessions, by the submarines of a foreign nation will serve to maintain peace between the United States and foreign nations, or to protect the commercial interests of the United States and its citizens, or to promote the security of the United States, and shall make proclamation thereof, it shall thereafter be unlawful for any such submarine to enter a port or the territorial waters of the United States or any of its possessions, or to depart therefrom, except under such conditions and subject to such limitations as the President may prescribe. When, in his judgment, the conditions which have caused him to issue his proclamation have ceased to exist, he shall revoke his proclamation and the provisions of this section shall thereupon cease to apply.

SEC. 6. Whenever, during any war in which the United States is neutral, the President shall find that the maintenance of peace between the United States and foreign nations, or the protection of the lives of citizens of the

United States, or the protection of the commercial interests of the United States and its citizens, or the security of the United States requires that the American citizens should refrain from traveling as passengers on the vessels of any belligerent nation, he shall so proclaim, and thereafter no citizen of the United States shall travel on any vessel of any belligerent nation except at his own risk, unless in accordance with such rules and regulations as the President shall prescribe: *Provided, however,* That the provisions of this section shall not apply to a citizen traveling on the vessel of a belligerent whose voyage was begun in advance of the date of the President's proclamation, and who had no opportunity to discontinue his voyage after that date: *And provided further,* That they shall not apply under ninety days after the date of the President's proclamation to a citizen returning from a foreign country to the United States or to any of its possessions. When, in the President's judgment, the conditions which have caused him to issue his proclamation have ceased to exist, he shall revoke his proclamation and the provisions of this section shall thereupon cease to apply.

SEC. 7. In every case of the violation of any of the provisions of this Act where a specific penalty is not herein provided, such violator or violators, upon conviction, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

SEC. 8. If any of the provisions of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby.

SEC. 9. The sum of $25,000 is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, to be expended by the Secretary of State in administering this Act.

Approved, August 31, 1935.

APPENDIX II

Statement by the President

August 31, 1935

I have given my approval to Senate Joint Resolution 173—the neutrality legislation which passed the Congress last week.

I have approved this joint resolution because it was intended as an expression of the fixed desire of the Government and the people of the United States to avoid any action which might involve us in war. The purpose is wholly excellent, and this joint resolution will to a considerable degree serve that end.

It provides for a licensing system for the control of carrying arms, etc., by American vessels, for the control of the use of American waters by foreign submarines; for the restriction of travel by American citizens on vessels of belligerent nations, and for the embargo of the export of arms, etc., to both belligerent nations.

The latter section terminates at the end of February 1936. This section requires further and more complete consideration between now and that date. Here again the objective is wholly good. It is the policy of this Government to avoid being drawn into wars between other nations, but it is a fact that no Congress and no Executive can foresee all possible future situations. History is filled with unforeseeable situations that call for some flexibility of action. It is conceivable that situations may arise in which the wholly inflexible provisions of section I of this act might have exactly the opposite effect from that which was intended. In other words, the inflexible provisions might drag us into war instead of keeping us out. The policy of the Government is definitely committed to the maintenance of peace and the avoidance of any entanglements which would lead us into conflict. At the same time it is the policy of the Government by every peaceful means and without entanglement

to cooperate with other similarly minded governments to promote peace.

In several aspects further careful consideration of neutrality needs is most desirable and there can well be an expansion to include provisions dealing with other important aspects of our neutrality policy which have not been dealt with in this temporary measure.

APPENDIX III

By the President of the United States of America

A PROCLAMATION

Whereas section 2 of a joint resolution of Congress, entitled "Joint resolution providing for the prohibition of the export of arms, ammunition, and implements of war to belligerent countries; the prohibition of the transportation of arms, ammunition, and implements of war by vessels of the United States for the use of belligerent states; for the registration and licensing of persons engaged in the business of manufacturing, exporting, or importing arms, ammunition, or implements of war; and restricting travel by American citizens on belligerent ships during war", approved August 31, 1935, provides in part as follows:

> The President is hereby authorized to proclaim upon recommendation of the Board from time to time, a list of articles which shall be considered arms, ammunition, and implements of war for the purposes of this section.

Now, therefore, I, Franklin D. Roosevelt, President of the United States of America, acting under and by virtue of the authority conferred upon me by the said joint resolution of Congress, and pursuant to the recommendation of the National Munitions Control Board, declare and proclaim that the articles listed below shall be considered arms, ammunition, and implements of war for the purposes of section 2 of the said joint resolution of Congress:

Category I.—(1) Rifles and carbines using ammunition in excess of caliber 26.5, and their barrels;

(2) Machine guns, automatic rifles, and machine pistols of all calibers, and their barrels;

(3) Guns, howitzers, and mortars of all calibers, their mountings and barrels;

(4) Ammunition for the arms enumerated under (1) and (2) above; i. e., high-power steel-jacketed ammuni-

tion in excess of caliber 26.5; filled and unfilled projectiles and propellants with a web thickness of 0.015 inch or greater for the projectiles of the arms enumerated under (3), above;

(5) Grenades, bombs, torpedoes, and mines, filled or unfilled, and apparatus for their use or discharge;

(6) Tanks, military armored vehicles, and armored trains.

Category II.—Vessels of war of all kinds, including aircraft carriers and submarines.

Category III.—(1) Aircraft, assembled or dismantled, both heavier and lighter than air, which are designed, adapted, and intended for aerial combat by the use of machine guns or for artillery or for the carrying and dropping of bombs, or which are equipped with, or which by reason of design or construction are prepared for, any of the appliances referred to in paragraph (2), below.

(2) Aerial gun mounts and frames, bomb racks, torpedo carriers, and bomb or torpedo release mechanisms.

Category IV.—Revolvers and automatic pistols of a weight in excess of 1 pound 6 ounces (630 grams), using ammunition in excess of caliber 26.5, and ammunition therefor.

Category V.—(1) Aircraft assembled or dismantled, both heavier and lighter than air, other than those included in category III;

(2) Propellers or air screws, fuselages, hulls, tail units, and under-carriage units;

(3) Aircraft engines.

Category VI.—(1) Livens projectors and flame throwers;

(2) Mustard gas, lewisite, ethyldichlorarsine, and methyldichlorarsine.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington this 25th day of September, in the year of our Lord nineteen hundred and thirty-five, and of the Independence of the United States of America the one hundred and sixtieth.

[SEAL] FRANKLIN D. ROOSEVELT.

By the President:

CORDELL HULL,
Secretary of State.

APPENDIX IV

Section IX. Special Provisions Regarding Italy and Ethiopia

The President on October 5, 1935, issued a proclamation as follows:

"BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

"A PROCLAMATION

"Whereas section 1 of a joint resolution of Congress, entitled 'Joint resolution providing for the prohibition of the export of arms, ammunition, and implements of war to belligerent countries; the prohibition of the transportation of arms, ammunition, and implements of war by vessels of the United States for the use of belligerent states; for the registration and licensing of persons engaged in the business of manufacturing, exporting, or importing arms, ammunition, or implements of war; and restricting travel by American citizens on belligerent ships during war', approved August 31, 1935, provides in part as follows:

"'That upon the outbreak or during the progress of war between, or among, two or more foreign states, the President shall proclaim such fact, and it shall thereafter be unlawful to export arms, ammunition, or implements of war from any place in the United States, or possessions of the United States, to any port of such belligerent states, or to any neutral port for transshipment to, or for the use of, a belligerent country';

"And whereas it is further provided by section 1 of the said joint resolution that—

"'The President, by proclamation, shall definitely enumerate the arms, ammunitions, or implements of war, the export of which is prohibited by this act.'

"And whereas it is further provided by section 1 of the said joint resolution that—

"'Whoever in violation of any of the provisions of this section, shall export, or attempt to export, or cause to be exported, arms, ammunition, or implements of war from the United States, or any of its possessions, shall be fined not more than $10,000 or imprisoned not more than five years, or both, and the property, vessel, or vehicle containing the same shall be subject to the provisions of sections 1 to 8, inclusive, title 6, chapter 30, of the act approved June 15, 1917 (40 Stat. 223–225; U. S. C., title 22, secs. 238–245).'

"Now, therefore, I, Franklin D. Roosevelt, President of the United States of America, acting under and by virtue of the authority conferred on me by the said joint resolution of Congress, do hereby proclaim that a state of war unhappily exists between Ethiopia and the Kingdom of Italy; and I do hereby admonish all citizens of the United States or any of its possessions and all persons residing or being within the territory or jurisdiction of the United States or its possessions to abstain from every violation of the provisions of the joint resolution above set forth, hereby made effective and applicable to the export of arms, ammunition, or implements of war from any place in the United States or its possessions to Ethiopia or to the Kingdom of Italy, or to any Italian possession, or to any neutral port for transshipment to, or for the use of, Ethiopia or the Kingdom of Italy.

"And I do hereby declare and proclaim that the articles listed below shall be considered arms, ammunition, and implements of war for the purposes of section 1 of the said joint resolution of Congress:

[Here follows the enumeration of articles as in the proclamation printed in section II, above.]

"And I do hereby enjoin upon all officers of the United States, charged with the execution of the laws thereof, the utmost diligence in preventing violations of the said joint resolution, and this my proclamation issued thereunder, and in bringing to trial and punishment any offenders against the same.

"And I do hereby delegate to the Secretary of State the power of prescribing regulations for the enforcement of section 1 of the said joint resolution of August 31, 1935, as made effective by this my proclamation issued thereunder.

"In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

"Done at the city of Washington this fifth day of October in the year of our Lord nineteen hundred and thirty-five, and of the Independence of the United States of America the one hundred and sixtieth.

"[SEAL] FRANKLIN D. ROOSEVELT.

"By the President:

"CORDELL HULL,

"*Secretary of State.*"

No export licenses will be issued for shipments destined to Ethiopia or Italy or any Italian possession of any of the arms, ammunition, or implements of war enumerated in the President's proclamation of October 5th, 1935.

In virtue of the power delegated to the Secretary of State to prescribe regulations for the enforcement of section 1 of the joint resolution of August 31, 1935, and of the President's proclamation issued thereunder, the Secretary of State may require exporters of any of the arms, ammunition, or implements of war enumerated in the President's proclamation to present convincing evidence that they are not destined to Ethiopia, Italy, or Italian possessions and may refuse to issue an export license for the same until such convincing evidence has been presented to him.

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